No. 72-1355

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM EARL MATTLOCK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming an order suppressing evidence.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–8a) is not yet reported. The final opinion and order of the district court (App. C, *infra*, pp. 10a–20a) are not reported. Two earlier opinions of the district court which were superseded by its final opinion appear in Appendices D and E, *infra*, pp. 21a–32a.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 9a) was entered on February 5, 1973. On

February 26, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to April 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, to establish the validity of a warrantless search consented to by a third party reasonably appearing to have authority to consent to the search, the government must prove that the consenting party also had the actual authority to consent to the search.

2. Whether, in opposing a motion to suppress evidence on the ground that the consent to the search was not valid, the government must prove the sufficiency of the consent "to a reasonable certainty."

3. Whether the hearsay rule applies to the introduction of evidence at suppression hearings and, if so, whether the out-of-court statements by respondent and a woman that they were married were inadmissible to show their joint occupancy of the bedroom which the woman authorized police officers to search.

STATEMENT

Respondent was indicted for bank robbery (18 U.S.C. 2113) in the United States District Court for the Western District of Wisconsin. In the district court, respondent moved to suppress certain items, including $4995 in cash, that had been seized in the course of three searches of the house in which he rented a bedroom. This motion was granted as to some of the items and denied as to others (App. C, *infra*). On appeal by the United States, the court of appeals affirmed (App. A, *infra*).

1. On the morning of November 12, 1970, respondent was arrested by local police officers in the yard of a house rented by Mr. and Mrs. Walter Marshall in Pardeeville, Wisconsin (App. C, *infra,* pp. 10a–11a). No question is raised as to the validity of the arrest.

At the time of the arrest the house was occupied by Mrs. Marshall, her three children (including her daughter Mrs. Gayle Graff), Mrs. Graff's young son, and respondent (App. C, *infra,* p. 11a). Gayle Graff, respondent, and the child had been living at the house since the preceding summer; they had previously lived together in Florida for several months (*ibid.*). Respondent occupied a bedroom on the east side of the second floor of the house (the "east bedroom") and had agreed to pay the Marshalls twenty-five dollars per week for room and board (*ibid.*). He was current in these payments, or nearly so, at the time of his arrest (App. C, *infra,* pp. 11a–12a).

It is undisputed that respondent and Mrs. Graff were not married to one another. However, at various times and places, and to various persons, they each represented that they were married or made statements indicating that they were husband and wife (App. C, *infra,* p. 15a). There was also additional evidence tending to show that at least from time to time they occupied the east bedroom together (App. C, *infra,* pp. 15a–16a).

Shortly after respondent's arrest, three local police officers went to the door of the Marshall house and were admitted by Mrs. Graff (App. C, *infra,* p. 12a). The officers told her that they were looking for money and a gun they believed to be hidden in the house, and

believed to be hidden in the house, and they asked they asked if they could make a search (*ibid.*). Although the officers did not inform Mrs. Graff of a right to withhold consent, she did consent to a search, without inquiring into the existence of such a right (*ibid.*).[1] Mrs. Graff told the officers that she and respondent together occupied the east bedroom (*ibid.*). None of the officers asked Mrs. Graff whether respondent occupied the room as a guest or as a paying tenant, whether she and respondent were married, or whether they had been living together as husband and wife, and Mrs. Graff said nothing to the officers on these subjects (*ibid.*).

In searching the bedroom, the police officers discovered and seized $4995 in cash concealed in the closet (App. A, *infra*, p. 2a).[2]

[1] The question whether investigating officers are required as a condition of a valid consent search to inform the consenting party of the right to withhold consent was not considered by the courts below. However, we note that this question is before this Court, in a somewhat different factual setting, in *Schneckloth* v. *Bustamonte*, No. 71-732, argued October 10, 1972.

[2] In addition to the cash, certain other items were also discovered and seized in the course of later searches of the east bedroom and the remainder of the house. The district court ordered some of those other items suppressed and we do not here contest their suppression. These other items were seized pursuant to consent given later in the day by Mrs. Marshall. To the extent the searches extended to the bedroom, the court concluded that Mrs. Marshall (who authorized the search) lacked authority to do so by reason of the rental agreement she had with respondent. The court conceded, however, that the officers who conducted the search had reasonably supposed that Mrs. Marshall possessed the authority she purported to exercise (App. C, *infra*, p. 18a). We disagree with the court's holding for the same reason we dispute its holding with respect

2. The district court held that where consent given by a third person is relied upon as the justification for a search, the government has the burden of proving, not only that the consent was voluntary and that it reasonably appeared to the officers that the person had authority to consent, but also that the person had actual authority to permit the search. The court found that Mrs. Graff's appearance and statements at the time of the search reasonably indicated to the investigating officers that she and respondent jointly occupied the east bedroom; the court therefore concluded that "just prior to the search, it reasonably appeared to the searching officers that facts existed which would render [Mrs.] Graff's consent [to the search of the east bedroom] binding on [respondent] * * *" (App. C, *infra*, p. 14a). However, the court ruled that the government had failed to establish that respondent and Mrs. Graff had in fact jointly occupied the east bedroom and concluded that Mrs. Graff did not have actual authority to consent to the search.[3]

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to the fruit of the search authorized by Gayle Graff (see *infra*)—that it mistakenly makes the lawfulness of a search depend on facts other than the situation as it reasonably appeared to the officers. However, the issue of the legality of the later seizures involves a distinct and unrelated question. We do not seek further review of that issue. The questions of general importance that we believe are involved in the case are adequately presented in the context of the morning search of the bedroom, and analysis of the issues is simplified by limiting the discussion to it.

[3] In reaching this conclusion, the court expressly disregarded testimony about out-of-court statements made by respondent and Mrs. Graff to the effect that they were married. The court also refused to consider Mrs. Graff's statements to the investigating officers that she shared the bedroom with respond-

The court therefore suppressed the evidence obtained from the east bedroom during the course of the search.

The court of appeals affirmed, holding that the validity of the search depended on proof of actual authority to consent, not merely apparent authority; that the government had to prove actual authority "to a reasonable certainty, by the great weight of the credible evidence" (App. A, *infra*, p. 6a),[4] and that the extra-judicial statements had been properly excluded from the suppression hearing as hearsay.

REASONS FOR GRANTING THE WRIT

This case involves important questions of criminal law. The courts below, in holding that valid consent to a warrantless search may not be given by one who reasonably appears to have, but actually does not (or may

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ent. The district court considered these statements inadmissible hearsay and the court of appeals agreed. We discuss below why we believe this evidence was properly admissible and why this Court should review the question (pp. 11–13, *infra*).

[4] The district court had stated in its opinion that the burden of proof borne by the government was proof "to a reasonable certainty, by the *greater* weight of the credible evidence" (App. C, *infra*, p. 16a; emphasis added). (This is in conformity with the approved standard of proof for civil trials in Wisconsin state courts. See 1 Wisconsin Board of Circuit Judges, *Wisconsin Jury Instructions-Civil* 200 (1972).) In its brief in the court of appeals the government inadvertently misquoted the standard as requiring proof "to a reasonable certainty, by the *great* weight of the credible evidence" (emphasis added) and contended that this posed an erroneously heavy burden of proof. Neither respondent nor the court of appeals noticed the discrepancy or considered it significant enough to advert to. The court of appeals, in affirming the suppression order, approved and applied the formulation that had been quoted in the government's brief. We challenge that standard here (pp. 10–11, *infra*).

not) have, authority to consent to the search, improperly extended the prohibition of the Fourth Amendment to searches and seizures which are in fact reasonable in light of the circumstances confronting the officers conducting the search. This result is contrary to the express language of the Amendment and to the decisions of this Court, see, *e.g.*, *Hill* v. *California*, 401 U.S. 797, and represents an unwarranted extension of the exclusionary rule not supported by its rationale. Furthermore, in approving the district court's judgment the court of appeals applied a burden-of-proof standard which this Court has held to be inappropriate for the determination of facts at suppression hearings. *Lego* v. *Twomey*, 404 U.S. 477. Finally, the decision below raises the question whether the rules of evidence applicable at trial—here the hearsay rules—apply in pre-trial hearings; even if they should apply, the decision approving the exclusion of some of the government's evidence as "hearsay" has seriously misapprehended the nature and purpose of the hearsay rule.

1. The courts below properly recognized that either of two persons jointly occupying premises, and sharing rights of use and possession, may validly consent to a search of the area subject to joint control. See, *e.g.*, *United States* v. *Johnson*, 413 F. 2d 1396, 1400 (C.A. 5); *United States* v. *Mackiewicz*, 401 F. 2d 219, 223–224 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Alloway*, 397 F. 2d 105, 108–110 (C.A. 6). Cf. *Frazier* v. *Cupp*, 394 U.S. 731. It is well understood that this rule applies to unmarried persons living together as husband and wife. See, *e.g.*, *Gurleski* v. *United States*, 405 F. 2d 253, 260–262 (C.A. 5),

certiorari denied, 395 U.S. 981; *United States* v. *Airdo*, 380 F. 2d 103, 105–107 (C.A. 7), certiorari denied, 389 U.S. 913; *Nelson* v. *California*, 346 F. 2d 73, 77 (C.A. 9), certiorari denied, 382 U.S. 964.

Moreover, the courts below acknowledged that the circumstances surrounding the search here in question, coupled with the statements made to the investigating officers by Mrs. Graff, the consenting party, made it reasonably apparent to the officers that she and respondent were jointly occupying the east bedroom. The further questions litigated below—whether a person reasonably appearing to be a joint occupant was one in fact, and, if not, whether a warrantless search conducted with her consent was valid—have seldom arisen in cases heretofore, because ordinarily there is no challenge to the status as joint occupant of the person who consented in that apparent capacity. We submit that whether the consenting party and the party seeking suppression are in fact joint occupants is irrelevant to the reasonableness of the search: the proper test is whether in the circumstances confronting them the investigating officers acted reasonably in concluding that the consenting party was a joint occupant and thereby authorized to consent to the search.

The Fourth Amendment by its terms protects against only "unreasonable" searches and seizures. In conducting an investigation, police officers must act on the basis of the facts as they appear at the time; what the Fourth Amendment requires is that their actions be reasonable. If police action is reasonable at the time it is undertaken, a subsequent discovery that the officers were misled by deceiving appearances does not

change the fact that their action was reasonable. Thus the California Supreme Court concluded, in *People* v. *Gorg*, 45 Cal. 2d 776, 783:

> [W]hen as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority.

See, also, *Gurleski* v. *United States, supra*, 405 F. 2d at 261.

Furthermore, exclusion of evidence because the police made a reasonable mistake as to the actual authority of the consenting party would frustrate legitimate law enforcement without advancing the interests served by the exclusionary rule. The purpose of the exclusionary rule is to eliminate an incentive for lawless invasions of privacy by the police. *Mapp* v. *Ohio*, 367 U.S. 643, 656; *Elkins* v. *United States*, 364 U.S. 206, 217. The application of the exclusionary rule, when it is conceded that the investigating officers reasonably believed they were being given effective consent to search, is obviously pointless; by definition it cannot have the effect of discouraging "lawless" conduct, and on the contrary it serves only to frustrate the search for truth by excluding probative evidence.

The decision below thus conflicts with this Court's holding in *Hill* v. *California*, 401 U.S. 797. In that case the Court sustained the legality of a search incident to the arrest of the wrong man, on the ground that the mistake in identity was reasonable. As the

Court there noted (401 U.S. at 804), "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." The same reasoning applies here. It was sufficient for Fourth Amendment purposes that the investigating officers responded reasonably to the facts as they appeared, in accepting as true the evidently credible statement by Mrs. Graff that she and respondent shared the east bedroom and in proceeding with confidence that they were validly authorized to search it.

2. Whether actual authority or apparent authority is the test of valid consent for Fourth Amendment purposes, the court below applied a legally erroneous standard of proof to the government's burden.[5] Even assuming *arguendo* that the courts below were correct in requiring the government to establish that the consenting party was in fact a joint occupant of the searched premises, the proper burden of proof to be borne by the government is merely that of the preponderance of the evidence. But the standard of proof approved and applied by the court of appeals required the government to prove actual authority "to a reasonable certainty". Only last Term this Court expressly rejected the contention that the voluntariness of a confession offered by the govern-

[5] We do not contend that the government does not bear the burden of proof. See *Vale* v. *Louisiana*, 399 U.S. 30, 34; *Chimel* v. *California*, 395 U.S. 752, 761; *Bumper* v. *North Carolina*, 391 U.S. 543, 548.

ment must be proved beyond a reasonable doubt, holding instead the admissibility of a confession challenged on Fifth Amendment grounds is to be judged by the same standard, preponderance of the evidence, properly applicable to evidence opposed on Fourth Amendment grounds. *Lego* v. *Twomey,* 404 U.S. 477, 488. Thus the court below was in clear error in applying the standard it did to the government's effort to show that the evidence had been lawfully seized.

3. In addition, even if the courts below were correct in requiring the government to prove that Mrs. Graff was in fact as well as appearance a joint occupant of the east bedroom, they erred in holding inadmissible the out-of-court statements made by her and respondent indicating that they were living together as husband and wife.

Even if that evidence was hearsay, it should be admissible at a pretrial hearing on a suppression motion. It has long been stated as a general principle that "[i]n *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply." 5 Wigmore, *Evidence* § 1385 (3d ed. 1940) (emphasis in original). Hearsay and other technical rules of evidence should be inapplicable at such interlocutory proceedings before the court "because there is no jury, and the rules of Evidence are, as rules, traditionally associated with a trial by jury." 1 Wigmore, *Evidence* § 4 (3d ed. 1940). Yet, as the decision below shows, the question has never been decisively settled for the federal courts. A related problem was involved in *Brinegar* v. *United States,*

338 U.S. 160, where this Court upheld the introduction at a suppression hearing of evidence which would have been inadmissible at trial, noting that evidence that would not be admissible at a trial to prove guilt could be admitted at a suppression hearing to show that officers acted on the basis of probable cause. Cf. *McCray* v. *Illinois,* 386 U.S. 300. The present case presents the more basic, underlying issue whether normally inadmissible evidence—hearsay—can be used at a pretrial hearing to prove an affirmative fact necessary for the admissibility of other evidence at trial. This is an important question in the administration of criminal justice and should be settled by this Court. Compare *Chambers* v. *Mississippi,* No. 71–5908, decided February 21, 1973.[6]

Furthermore, even if the hearsay rule does apply to suppression hearings, the courts below erred in refusing to consider, on the issue of joint occupancy, the statements by respondent and Mrs. Graff that they were married. These statements were not hearsay: they were offered not to prove the truth of the matter asserted, *i.e.,* the existence of a valid marriage, but rather as circumstantial evidence on the issue of joint occupancy. See 5 Wigmore, *Evidence* § 1361 (3d ed. 1940); McCormick, *Evidence* § 225 (1954); Rule 801 (c) of the Proposed Federal Rules of Evidence. When a man and woman publicly and repeatedly proclaim that they are married (even though they in fact are

[6] Rule 104 of the Proposed Federal Rules of Evidence would expressly provide that in determining the admissibility of evidence the judge "is not bound by the rules of evidence * * *." Under Pub. L. 93–12, signed by the President on March 30, 1973, the effectiveness of those rules is indefinitely suspended until further affirmative action by Congress.

not), a reasonable inference can be drawn that they are living together as spouses and sharing a common abode. The government was erroneously denied the benefit of evidence supporting that inference.[7]

In addition, evidence of respondent's statements that Mrs. Graff was his "wife" would be admissible even to prove such a fact, since under settled principles an out-of-court statement made by an adverse party is admissible against him as an admission. McCormick, *Evidence* § 239 (1954); 4 Wigmore, *Evidence* § 1048 (3d ed. 1940); Rule 801(d)(2) of the Proposed Federal Rules of Evidence.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

APRIL 1973.

[7] It was necessary as a practical matter to introduce evidence of the out-of-court statements since at the suppression hearing Mrs. Graff refused to say whether she and respondent had been cohabiting, claiming her privilege against self-incrimination (1 Tr. 101–102). ("1 TR." refers to the transcript of the proceedings of April 5, 1971, a copy of which has been lodged with the clerk of this Court.)

U.S. GOVERNMENT PRINTING OFFICE: 1973

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM, 1972—SEPTEMBER SESSION, 1972

No. 72-1449

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

WILLIAM EARL MATTLOCK, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Wisconsin. No. 71 CR 13. James E. Doyle, Judge

Argued November 30, 1972—Decided February 5, 1973

Before HASTINGS, Senior Circuit Judge, CAMPBELL, Senior District Judge,* and MORGAN, District Judge.*

MORGAN, *District Judge.* This appeal is prosecuted by the United States to review an order of the court below suppressing certain evidence seized by state officers and FBI agents in three separate warrantless searches of a residence house.

On November 12, 1970, at about 9:30 a.m., sheriff's officers of Columbia County, Wisconsin, arrested defendant, a bank robbery suspect, in the yard of a residence house rented by a Walter Marshall and

*Senior District Judge William J. Campbell of the United States District Court for the Northern District of Illinois and Chief Judge Robert D. Morgan of the United States District Court for the Southern District of Illinois are sitting by designation.

Elaine Marshall, the arrest being made some distance from the house itself. Residents of the house at the time were Elaine Marshall, Gayle Graff, a daughter of the Marshalls, Graff's infant son, at least two younger Marshall children, and the defendant.

Immediately after the arrest, certain of the officers went to the house and were admitted by Graff. The officers told Graff that they were looking for money and a gun and wished to search the house. Graff consented. The officers seized $4,995 and certain other items from a closet and a dresser drawer in a second floor bedroom, identified in the record as the east bedroom.

The same officers conducted a second search shortly after the first was concluded. Graff again admitted them to the house and consented to a further search.[1] Certain items were then seized from a closet on the first floor of the house. The second search began about 10:15 a.m.

The third search was conducted about 4:30 p.m. of the same day by FBI agents and local officers. Three of the officers were admitted to the house by one of the younger children, where they waited while the fourth officer involved brought Mrs. Marshall from her place of employment to the house. Mrs. Marshall signed a written consent to search. During that search, certain items were seized from a dresser drawer in the east bedroom. Others were seized from locations on the first floor.

Following extensive evidentiary hearings, the court found and concluded that the government had proved that it reasonably appeared to the several officers, just prior to the searches, that facts existed in each in-

[1] The court did not consider the question whether Graff's consents were voluntary, in light of the fact that she was never advised that she had the right to refuse consent.

stance from which the officers could reasonably believe that both Graff and Mrs. Marshall had authority to consent to a search and that their respective consents would be binding upon the defendant. The evidence related to Graff's apparent authority to consent was that she and defendant, among others, resided in the house; that she admitted the officers while dressed in night clothes and a robe; that she then told the officers that she and defendant both occupied the east bedroom, and that women's clothing therein contained were hers; and that she had told the officers that she used the two upper drawers of a dresser in the room and the defendant used the two lower drawers.

The appearance of Mrs. Marshall's authority was found in the fact that she and her husband were the lessees of the whole premises from a third party owner. Though finding apparent authority to consent, the trial judge expressed his incredulity of the fact that none of the officers had asked Mrs. Marshall about the arrangement under which defendant occupied the east bedroom.

The judge expressed a reservation as to search of the bottom two dresser drawers, since there was no testimony as to whether Graff's statement that defendant, only, used those drawers was made before or after the search, saying that if the information was known prior to the search, there was no apparent authority to bind defendant by Graff's consent.

From Mrs. Marshall's testimony, the court found that a rental agreement had existed between defendant and Mrs. Marshall, pursuant to which he paid her $25.00 per week for the use of the east bedroom and board. The court found and concluded that prior to the several searches, facts did not exist which would render the consent of either Graff or Mrs. Marshall

to a search of the east bedroom binding upon the defendant.

In that regard, the court refused to consider the hearsay evidence that Graff had stated to the searching officers that she occupied the east bedroom with the defendant, and that certain clothing there located was hers, as substantive evidence that the room was jointly occupied by her and the defendant.[2]

The court ordered that all evidence seized from the east bedroom be suppressed. Defendant's motion to suppress evidence seized from other areas of the house was denied on the ground that defendant had no standing to object to a search of any part of the house except the east bedroom.

The government's principal contention against the suppression order is that appearance of authority to consent satisfies Fourth Amendment requirements, and that the court erred in requiring proof of facts showing actual authority to consent. Thus, the government argues that an imposter, having no connection with a residence searched, would bind a putative defendant if it reasonably appeared to the searching officer that the imposter had the right to consent to a search. Statement of the argument is largely its own refutation. Furthermore, the government bases its position to a great extent upon *United States* v. *Rabinowitz*, 339 U.S. 56 (1950). *Rabinowitz* can only be viewed as shaky authority, since the broad rationale of that case was quite generally overruled in *Chimel* v. *California*, 395 U.S. 752, 768 (1969).

[2] That hearsay evidence was admitted and considered for its bearing upon the question of the reasonableness of appearance to the officers of Graff's authority to bind defendant by her consent.

Security in one's home from unreasonable searches and seizures is a personal right, *e.g., Stoner* v. *California,* 376 U.S. 483, 489 (1964); *Anderson* v. *United States,* 399 F. 2d 753, 755 (10 Cir., 1968), not to be eroded "by unrealistic doctrines of 'apparent authority.'" *Stoner* v. *California, supra,* at 488.

One of joint occupants of a residence may consent to a search of the premises jointly occupied and by his consent bind the nonconsenting occupant to face the evidence seized. *E.g., United States* v. *Stone,* No. 71-1580, 7 Cir., decided November 29, 1972; *United States* v. *Airdo,* 380 F. 2d 103 (C.A. 7 1967), *cert. denied,* 389 U.S. 913. The government relies wholly on such cases. *United States* v. *Wixom,* 441 F. 2d 623 (C.A. 7 1971); *United States* v. *Botsch* 364 F. 2d 542 (C.A. 2 1966), *cert. denied,* 386 U.S. 937; and *Drummond* v. *United States,* 350 F. 2d 983 (C.A. 8 1965), *cert. denied,* 384 U.S. 944, all involving consent by one of partners in crime to search premises to which all had equal access; *United States* v. *Airdo, supra,* involved admitted joint occupany; *Burge* v. *United States,* 342 F. 2d 408 (C.A. 9 1965), *cert. denied,* 382 U.S. 829, joint occupants of a bathroom searched; *Weaver* v. *Lane,* 382 F. 2d 251 (C.A. 7 1967), *cert. denied,* 392 U.S. 930, consent by hostess to search room of temporary visitor; *Gurleski* v. *United States,* 405 F. 2d 253 (C.A. 5 1968), involved joint use and possession of automobile. It is equally clear that a landlord cannot by his consent waive a tenant's right to be free from an unreasonable search. *Chapman* v. *United States,* 365 U.S. 610 (1961). Nor can a person having no right of occupancy of premises bind another by his consent to a search of the premises. *Stoner* v. *California, supra.*

A comparison of the many cases reveals that a vicarious consent is sustained only when actual authority to consent is shown to have existed when consent was given. In our view, Judge Doyle has simply articulated the correct principle which courts until now have applied without clear articulation thereof. He correctly held that defendant's constitutional rights could be waived only if it was proved that reasonable appearance of authority to consent existed and, also, that just prior to the search, facts existed showing actual authority to consent. We cannot reject his finding that the government failed to prove that actual authority did exist. Such actual authority is, of course, to be distinguished from actual permission to consent, which need not be proved.

The court below correctly placed the burden upon the government to prove that defendant's Fourth Amendment rights were waived. *E.g., Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970); *Chimel* v. *California*, 395 U.S. 752, 761 (1969); *Stoner* v. *California*, 376 U.S. 483, 486 (1964). The government appears before the court asserting misplaced reliance upon inapposite cases dealing with either the challenged validity of a search warrant or the issue of standing to move to suppress seized evidence. *E.g., Jones* v. *United States*, 362 U.S. 257, 261 (1960), and *Brandon* v. *United States* 270 F. 2d 311, 312–313 (D.C. Cir., 1959), *cert. denied*, 362 U.S. 943 (issue was standing to pursue motion to suppress); *United States* v. *Rellio*, 39 F. Supp. 21 (E.D. N.Y., 1941) (challenged legality of a warrant).

The government also challenges the court's statement that the authority of the consenter to bind a putative defendant must be proved "to a reasonable certainty, by the great weight of the credible evidence" as applying an erroneous standard of proof.

The sustaining of the contention that a constitutional right has been waived invokes a high standard of proof of facts showing waiver. *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *United States* v. *Coleman*, 322 F. Supp. 550, 553 (E.D. Pa., 1971); *United States* v. *Cole*, 325 F. Supp. 763, 768 (S.D. N.Y., 1971). The district court's statement of the standard of proof required to prove the fact of authority to bind defendant is consistent with the principle enunciated in those cases and is not subject to abstract criticism.

Finally, the government contends that the court erroneously excluded extra judicial statements and other hearsay evidence as bearing upon the issue of the existence of actual authority to bind the defendant by Graff's consent. Thus, the court excluded Graff's hearsay statements to officers that she occupied the east bedroom with defendant and testimony that both defendant and Graff had stated publicly several times that they were married. The evidence was properly excluded pursuant to the well established rule that hearsay is not admissible as substantive evidence to prove the existence of a fact in issue. *Bridges* v. *Wixon*, 326 U.S. 135, 153–154 (1945); 29 Am. Jur. 2d, Evidence, §§493, 495. The hearing below cannot be equated with that on a petition for a search warrant, as the government contends. An unreasonable, warrantless search is not insulated against constitutional objection by the fact that probable cause did in fact exist. *Vale* v. *Louisiana*, *supra*, at 341; *Chimel* v. *California*, *supra*, at 762. A search warrant should have been obtained in this case.

The record supports the findings that a rental agreement did exist between defendant and Mrs. Marshall, and that there was no proof of facts showing actual

authority in either Graff or Mrs. Marshall to consent to a search of the east bedroom.

The court below did not direct what disposition was to be made of the cash and other evidence suppressed. It should do so. The judgment will be affirmed and the cause remanded to the court below for that determination and such further proceedings as may be required.

Affirmed and Remanded.

A true copy:
Teste:

_____ _____,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for the Seventh Circuit

FEBRUARY 5, 1973

No. 72-1449

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

WILLIAM EARL MATTLOCK, DEFENDANT-APPELLEE

Before Hon. JOHN S. HASTINGS, Senior Circuit Judge,
Hon. WILLIAM J. CAMPBELL, Senior District Judge,
Hon. ROBERT D. MORGAN, Chief District Judge

Appeal From the United States District Court for the Western District of Wisconsin

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, and this cause be and the same is hereby REMANDED to the said District Court, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the United States District Court for the Western District of Wisconsin

[Filed March 9, 1972]

71-CR-13

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILLIAM EARL MATTLOCK, DEFENDANT

OPINION AND ORDER

The defendant has moved to suppress the fruits of three searches of the Walter Marshall home in a rural area near Pardeeville, Columbia County, Wisconsin, in this district, on November 12, 1970. Two evidentiary hearings have been held. I have concluded that the burden is upon the Government to prove, to a reasonable certainty, by the greater weight of the credit evidence, all of the facts necessary to establish that the warrantless search was not "unreasonable", within the meaning of the Fourth Amendment. On this basis, I find the facts as they are set forth in the following section of this opinion. The findings of fact and conclusions of law set forth in this opinion supersede any findings or conclusions heretofore entered with respect to the motion to suppress.

FACTS

At about 9:30 a.m., November 12, 1970, several local law enforcement officers went to the Marshall home for the purpose of arresting the defendant, and they

did arrest him in the yard of the home, some substantial distance from the house. The defendant offered no resistance, and he was placed in a squad car parked some distance from the house. The first of the three searches of the house commenced immediately thereafter.

At no time on November 12, 1970, was a search warrant obtained by any law enforcement officers for the purpose of conducting a search of the Marshall home. There was adequate time to obtain one or more warrants. There was no emergency, nor danger to any police officer or other persons which required that the search proceed without awaiting the time at which a search warrant could be applied for. The search of the house was not incidental to the arrest of the defendant.

For some time prior to November 12, 1970, and on that day, the house was rented by Walter Marshall and Elaine Marshall, husband and wife, from the owner, and was occupied by Elaine Marshall, her 13 year old daughter Kathleen, her 16 year old son Steven, and perhaps other family members, and also by a daughter Gayle Graff, by Gayle's three year old son, and by the defendant. Gayle Graff and her son had been living in Florida. They had come to Wisconsin with the defendant in the summer of 1970, and they had been living at the Marshall home continually thereafter to and through November 12, 1970. At no time prior to, or on November 12, 1970, were Gayle Graff and the defendant married to one another. The defendant occupied a bedroom on the east side of the second floor (referred to hereinafter as the east bedroom). There was an agreement between Mr. and Mrs. Marshall and the defendant that he would pay them $25 per week for the room and his board. He was current in his payments, or nearly so, as of Novem-

ber 12. At no time did the defendant consent to a search of any part of the house.

On the occasion of the first search on November 12, three local law enforcement officers went to the door of the house at about 9:45 a.m. They were admitted by Gayle Graff who was dressed in a robe and was carrying her son. One of the officers believed, from earlier observation of the house, that Gayle was living there. The officers told her that they were looking for money and a gun. At this time the officers did not know where in the house, if anywhere, the money or gun was located, nor did they know which part of the house, if any, had been occupied by the defendant. They asked Gayle whether they could search the house. They did not tell her that she was not required to consent to the search. She consented. She told the officers that the east bedroom was occupied by the defendant and by her. She then consented to a search of the east bedroom. She told the officers that she used the top two drawers of a dresser in the east bedroom and the defendant used the bottom two drawers. None of the officers made any inquiries concerning whether the defendant occupied the east bedroom as a guest or as a paying tenant, nor whether the defendant and Gayle were married or whether they had been living together regularly in the Marshall house or elsewhere, and nothing was said to the officers on these subjects. Certain items were found by the searching officers in the second drawer from the bottom of the dresser and in the closet of the east bedroom.

The second search occurred at about 10:15 a.m., within a few minutes after the conclusion of the first search. The same local officers returned to the house and were admitted by Gayle Graff. They said that they wished to continue their search. They did not tell her that she was not required to consent. She con-

sented. Certain items were found in a downstairs pantry.

The third search occurred at about 4:30 p.m. Two special agents of the Federal Bureau of Investigation and two local law enforcement officers participated in it. The two special agents and one of the local officers went to the Marshall house at about 3:30 p.m. They were admitted to the house by Steven. They sat in the kitchen and conversed with Steven. Elaine Marshall was brought to the house by the second local officer. The officers introduced themselves to her, told her they wished to search the house, and informed her that she had a right to decline. She executed a written consent to a search of the entire house. She told them that she and her husband rented the house. No inquiry was made concerning whether the defendant had been living in the house as a paying or non-paying guest. The search was made. Certain items were found in a drawer of the dresser in the east bedroom, and certain items downstairs.

OPINION

In testing whether each of the three searches was "unreasonable," within the meaning of the Fourth Amendment, I will apply the following rule: that a warrantless search of a house and of a particular part of a house, which search is not incidental to an arrest and is not required by some emergency to be conducted without awaiting a warrant, is unreasonable, within the meaning of the Fourth Amendment, unless the search of the house and of the particular part of the house is freely and voluntarily consented to, and the following conditions are met:

(1) it reasonably appears to the searching officers, just prior to the search, that facts exist which

will render the consenter's consent binding on the putative defendant; and also

(2) just prior to the search, facts do exist which render the consenter's consent binding on the putative defendant.

(A) THE FIRST SEARCH IN THE MORNING

With respect to the first search of the east bedroom on the second floor in the morning, I conclude that just prior to the search, it reasonably appeared to the searching officers that facts existed which would render Gayle Graff's consent binding on the defendant Mattlock. That is, the defendant's presence in the yard of the house at the time of his arrest just prior to the search, Gayle Graff's residence in the house for some time and her presence in the house just prior to the search, her attire just prior to the search, and her statement to the officers that she and the defendant occupied the east bedroom were sufficient to create a reasonable appearance to the officers that she and the defendant jointly occupied that space and that her consent to a search of that space would be binding upon the defendant. I conclude that the reasonableness of this appearance does not depend upon whether the two persons appeared to the officers to be married or unmarried, nor upon whether their joint occupancy of the bedroom had continued over a relatively long or short period of time, so long as it appeared to have been for a period of reasonable length.

However, I conclude that the government has failed to meet its burden of proof that facts did indeed exist which rendered Gayle Graff's consent to a search of the east bedroom binding on the defendant Mattlock. The proof as to the reality, rather than the appearance, may be summarized as follows:

Gayle Graff told the searching officers that she and the defendant occupied the east bedroom and that they shared the bedroom dresser. She told the federal agents on November 12, after the two morning searches but prior to the afternoon search, that she and the defendant had been sleeping together in the east bedroom regularly, including the early morning of November 12. These extra-judicial statements are not admissible to prove the truth of the statements.

At various times and places and to various persons, Gayle Graff made statements and the defendant made statements indicating that they were wife and husband. The government urges, correctly, that it is entitled to prove that such statements were made. But these extra-judicial statements are not admissible to prove that the two were married (which they were not) or that they were sleeping together as a husband and wife might be expected to do.

From about April to August, 1970, Gayle Graff and the defendant lived together in a one-bedroom apartment in Florida. I find this testimony credible, and also conclude that it permits a mild inference that they slept together at times later in 1970 in her parents' home in Wisconsin.

While the defendant and Gayle Graff were living in the Marshall home from about August to November 12, 1970, they were observed to go upstairs together six times or less, at unspecified hours of the day or night, but probably not later than early evening (since the witness was a 14 year old neighbor and frequent visitor). On a morning in September, 1970, some time prior to 9:00 a.m., a visitor observed Gayle Graff descend from the second floor, clad in a bathrobe and nightgown. A few minutes thereafter, he saw the defendant descend the stairs, completely clothed. I find this testimony credible, and also conclude that it permits a mild

inference that the two slept together at times in the east bedroom.

At the time of the search, there were two pillows in the double bed in the east bedroom; the bed had been slept in; in the closet, there was men's clothing and women's clothing; in two drawers of the dresser, there was women's clothing; in the other two drawers, there was men's clothing. I find this testimony credible, and I also conclude that it permits an inference that Gayle Graff and the defendant slept together at times in the east bedroom.

Gayle Graff told the searching officers that the women's clothing in the dresser was hers. This extra-judicial statement is not admissible to prove that the clothing was hers.

Excluding the inadmissible extra-judicial statements, I conclude that the government has failed to prove, to a reasonable certainty, by the greater weight of the credible evidence, that at the time of the search, and for some period of reasonable length theretofore, Gayle Graff and the defendant were living together in the east bedroom.

The government contends that only the test of appearance should determine whether a search is unreasonable within the meaning of the Fourth Amendment, and that an additional test of reality should not be applied. I cannot agree. To accept the government's view would require the court to receive against a defendant in a criminal case evidence obtained in a warrantless search of his home on the basis of consent given by an utter imposter who falsely claimed ownership of the home under plausibly deceiving circumstances. I believe that the test must be that the consenter was in truth, as well as in appearance, entitled to bind the putative defendant by consenting to the search.

Additionally and separately, I conclude that evidence taken from the bottom two drawers of the dresser cannot be received against the defendant Matlock, even if it were assumed that Gayle Graff and the defendant in fact jointly occupied and used the bedroom and the bedroom closet. The record does not disclose whether it was before or after the search of the dresser that Gayle Graff informed the officers that she used the top two drawers and he used the bottom two. If this information was given prior to the search, there was neither appearance nor reality to permit the defendant to be bound by Gayle Graff's consent to the search of the bottom two drawers. If this information was given after the search, and if it was true, the appearance test may have been met but not the reality test. I cannot determine whether the statement made to the searching officers by Gayle Graff about the dresser drawers was true or false, nor when it was made. But I conclude that the burden was upon the government to prove that the statement was not made until after the search and also that it was not true. The government has not met this burden.

I express no view whether the first search of the east bedroom was valid in the absence of advice to Gayle Graff that she was not obliged to consent to a search.

(B) THE SECOND SEARCH IN THE MORNING

The defendant has no standing to object to a search of any part of the house other than the east bedroom. Evidence found elsewhere in the second search in the morning (or in any search at any time) will not be suppressed.

(C) THE AFTERNOON SEARCH

With respect to the afternoon search of the east bedroom, I conclude that it reasonably appeared to the searching officers that the facts existed which would render Elaine Marshall's consent binding on the defendant Mattlock. That is, it reasonably appeared to them that Elaine Marshall and her husband were the lessees of the house, because she told them so and because she undertook to sign a written form of consent to the house.

I reach this conclusion with difficulty. By the time of the afternoon search, the federal agents had interviewed Gayle Graff and she had told them that she and the defendant had been sleeping together in the east bedroom regularly for some time prior to, and on, November 12. Assuming that these officers were determined to proceed later that afternoon to conduct a further search of the house without a warrant, as apparently they were, however inexplicably, the statements made to them by Gayle Graff might well have prompted them to inquire of Elaine Marshall concerning the arrangements, financial or otherwise, under which the defendant was occupying the east bedroom. But they made no such inquiry. To conclude, as I have, that they then might consider reasonable the appearance that Elaine Marshall was in a position to consent to the search of the east bedroom is to strain a point to its limits.

However, I conclude that the government has failed to meet its burden of proof that facts did indeed exist which rendered Elaine Marshall's consent to a search of the east bedroom binding on the defendant Mattlock. In the findings of fact set forth earlier in this opinion, I have found that there was an arrang[e]ment between Mr. and Mrs. Marshall and the defendant

that he would pay them $25 per week for the use of the east bedroom and for his board; and that he was current in his payments, or nearly so, as of November 12. These findings are based upon the testimony of Elaine Marshall, called by the government as its witness at the suppression hearing, during the course of cross-examination by counsel for defendant Mattlock; which testimony was repeated by her at a resumed suppression hearing, when called by the government. Quite understandably, the government urges the court to refrain from this finding, emphasizing that when she was called as a witness by the government at yet another resumed suppression hearing, she was vague and evasive on the subject of the rental arrangement. There is no doubt that Elaine Marshall is an unimpressive witness and that she was vague and evasive on the subject of the rental arrangement by the time of her third appearance. But it was the government's burden to prove facts supporting the proposition that she was entitled to consent to the search of the east bedroom. I have observed earlier, and I continue in the view, that it is inherently credible that the Marshall's would seek payment from the defendant for his board and room. Also, the evidence is uncontradicted that after coming to the Marshall home, the defendant worked at a loggingmill for a time, and received two $100 payments from a brother-in-law, which payments were about a month apart.

ORDER

For the reasons stated, and upon the basis of the entire record herein, IT IS HEREBY ORDERED that no evidence obtained from a search of the east bedroom of the Marshall home will be received at the trial of the defendant in this action. In all other re-

spects, the defendant's motion to suppress is denied.

Entered this 9TH day of March, 1972.

By the Court:

JAMES E. DOYLE,
District Judge.

APPENDIX D

In the United States District Court for the Western District of Wisconsin

[Filed June 22, 1971]

71-CR-13

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILLIAM EARL MATTLOCK, DEFENDANT

INTERIM OPINION

Upon reflection, following today's hearing and following a rereading of my opinion and order of May 28, 1971, and in view of a remark I made during today's hearing in a moment of confusion, I believe that there may be an ambiguity which may result in unfairness to counsel and the parties unless it is clarified promptly.

It appears to me that in the case of a warrantless search in which the government relies upon consent given by someone (the consenter) other than the person (the defendant) against whom the evidence found is sought to be introduced, there are these possible alternative rules:

1. The search is valid if it reasonably appeared to the officers, just prior to the search, that facts existed which would render the consenter's consent legally binding on the defendant, without regard to whether such facts did exist.

2. The search is valid only:
   (a) if it reasonably appeared to the officers, just prior to the search, that facts existed which would render the consenter's consent legally binding on the defendant; and
   (b) if, at the time of the search, facts did exist which rendered the consenter's consent legally binding on the defendant.
3. The search is valid if, at the time of the search, facts did exist which rendered the consenter's consent legally binding on the defendant, without regard to how the matter may have appeared to the officers just prior to the search.

I consider that my opinion of May 28, 1971, embraced alternative 2; that I held that, with respect to Gayle Graff's consent to the search of the east bedroom, condition 2(a) had not been met; that I held, as a separate and additional ground, that condition 2(b) had not been met; that I held that the plaintiff had not had fair warning that condition 2(b) would be imposed; and that I held that the government should have an opportunity for a further evidentiary hearing on condition 2(b). The government elected to take this opportunity and it presented evidence today with respect to condition 2(b).

If I adhere to my opinion of May 28, 1971, as I presently intend to do, I will continue to hold the search invalid because condition 2(a) has not been met. However, with respect to the alternative ground of the May 28, 1971 opinion, namely, that condition 2(b) had not been met, I will reopen that question, consider the evidence properly received at today's hearing, and make new findings and conclusions with respect to 2(b). If the matter were then to be reviewed by an appellate court, it would have the bene-

fit of my findings and conclusions on both 2(a) and 2(b).

With respect to whether the defendant is bound by Mrs. Marshall's consent to the search of the east bedroom, I understand the questions to be: (1) Is it permissible and, if so, just, to reopen the factual question concerning a rental arrangement between the defendant and the Marshalls? (2) If the factual question is to be reopened, what factual finding should now be made on the basis of the entire record of the two evidentiary hearings?

Entered this 22d day of June, 1971.

By the Court:

JAMES E. DOYLE,
District Judge.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed May 28, 1971]

71-CR-13

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILLIAM EARL MATTLOCK, DEFENDANT

OPINION AND ORDER

The defendant has moved to suppress the fruits of three searches of the Walter Marshall home in a rural area near Pardeeville, Columbia County, Wisconsin, in this district, made on November 12, 1970. An evidentiary hearing has been held. I find the facts to be as set forth in the following section of this opinion.

FACTS

At about 9:30 a.m., November 12, 1970, several local law enforcement officers went to the Marshall home for the purpose of arresting the defendant, and they did arrest him in the yard of the home, some substantial distance from the house. The defendant offered no resistance, and he was placed in a squad car parked some distance from the house. The first of the three searches of the house commenced thereafter.

At no time on November 12, 1970, was a search warrant obtained by any law enforcement officer for

the purpose of conducting a search of the Marshall home. There was adequate time to obtain one or more search warrants. There was no emergency, nor danger to any police officer or other persons which required that the search proceed without awaiting the time at which a search warrant could be applied for. The search of the house was not incidental to the arrest of the defendant.

The house was being rented at the time by Walter Marshall and Elaine Marshall, husband and wife, from the owner. The house was being occupied at the time by Elaine Marshall, her 13 year old daughter Kathleen, her 16 year old son Steven, and perhaps other family members, and also by a daughter Gayle Graff, by Gayle's three year old son, and by the defendant. Gayle Graff and her son had been living in Florida. They had come to Wisconsin with the defendant in the summer of 1970, and they had been living at the Marshall home continually thereafter to November 12, 1970. The defendant occupied a bedroom on the east side of the second floor (referred to hereinafter as the east bedroom). There was an agreement between Mr. and Mrs. Marshall and the defendant that he would pay them $25 per week for the room and his board. He was current in his payments, or nearly so, as of November 12.[1] At no time did the

[1] I base the finding with respect to the rental arrangement on the testimony of Elaine Marshall. The government urges that I reject her entire testimony because her credibility was seriously impeached. However, it is inherently credible that the Marshalls would seek payment from the defendant for his board and room. There is uncontradicted evidence, and I find, that he worked at a logging mill nearby for a time and that he received two $100 payments from a brother-in-law after coming to Wisconsin, and that there was an interval of about one month between the two payments.

defendant consent to a search of any part of the house.

On the occasion of the first search on November 12, three local law enforcement officers went to the door of the house at about 9:45 a.m. They were admitted by Gayle Graff who was dressed in a robe and was carrying her son. One of the officers believed, from earlier observation of the house, that Gayle was living there. The officers told her that they were looking for money and a gun. At this time the officers did not know where in the house, if anywhere, the money or gun was located, nor did they know which part of the house, if any, had been occupied by the defendant. They asked Gayle whether they could search the house. They did not tell her that she was not required to consent to the search. She consented. She told the officers that the east bedroom was occupied by the defendant and by her. She consented to a search of the east bedroom. She told the officers that she used the top two drawers of a dresser in the east bedroom and the defendant used the bottom two drawers. None of the officers made any inquiries concerning whether the defendant occupied the east bedroom as a guest or as a paying tenant, nor whether the defendant and Gayle were married or whether they had been living together regularly in the Marshall house or elsewhere, and nothing was said to the officers on these subjects. Certain items were found by the searching officers in the second drawer from the bottom of the dresser and in the closet of the east bedroom.

The second search occurred at about 10:15 a.m., within a few minutes after the conclusion of the first search. The same local officers returned to the house and were admitted by Gayle Graff. They said that they wished to continue their search. They did not tell her that she was not required to consent. She

consented. Certain items were found in a downstairs pantry.

The third search occurred at about 4:30 p.m. Two special agents of the Federal Bureau of Investigation and two local law enforcement officers participated in it. The two special agents and one of the local officers went to the Marshall house at about 3:30 p.m. They were admitted to the house by Steven. They sat in the kitchen and conversed with Steven. Elaine Marshall was brought to the house by the second local officer. The officers introduced themselves to her, told her they wished to search the house, and informed her that she had a right to decline. She executed a written consent to a search of the entire house. She told them that she and her husband rented the house. No inquiry was made concerning whether the defendant had been living in the house as a paying or non-paying guest. The search was made. Certain items were found in a drawer of the dresser in the east bedroom, and certain items downstairs.

OPINION

With respect to any items found in any of the three searches in places other than the east bedroom, the motion to suppress must be denied. With respect to the parts of the house other than the east bedroom, whether the consent of Gayle Graff in the morning or that of Elaine Marshall in the afternoon was effective is irrelevant. Defendant enjoys no standing to dispute the lawfulness of the search in those other parts of the house. *Alderman v. United States*, 394 U.S. 165, 174 (1969).

With respect to the third search (in the afternoon), any evidence found in the east bedroom must be suppressed. Even if we were to assume the correctness of the government's contention that the lawfulness of the

search is to be tested by how matters reasonably appeared to the officers, rather than by the objective reality of the situation, there is nothing to support the further contention that it reasonably appeared to the officers that the defendant had been occupying the east bedroom as a non-paying guest. They made no inquiry on the subject and nothing was said to them on the subject.

The most difficult question concerns any items which may have been found in the east bedroom during either the first or second search in the morning. The issue is whether the consent by Gayle Graff was effective to bind the defendant. A threshold question is whether consent in such a situation is effective only if the woman is actually lawfully married to the defendant. For the moment, I will assume, without deciding, that the consent can be effective if there is a sufficiently close relationship, of sufficiently long standing, even in the absence of a lawful marriage. If we apply the "reasonable appearances" test for which the government contends, it is necessary to consider the effect of Gayle Graff's statement to the officers that she and the defendant both occupied the east bedroom. She also said, at some time, that she used the two top drawers of a dresser in that room and he used the bottom two; it is not clear whether this was said before the officers entered the room; it is reasonable to infer that it was not said until after they had entered the room and had at least seen the dresser, and it is also reasonable to infer that it was said after the dresser had actually been searched; I disregard the statement by Gayle Graff about the dresser as a possible prop for "reasonable appearances" just prior to the search. It is also true that later in the day,

Gayle was interviewed by the two federal agents and made various statements to them bearing on her relationship with the defendant. However, these subsequent statements to the federal officers obviously have no bearing upon how the matter appeared earlier to the local officers. I conclude that even if a continuing pattern of living together in a certain space is sufficient to make the woman's consent binding upon the man, the appearance of things in the morning of November 12, prior to the search of the east bedroom, did not provide a reasonable basis for the searching officers to believe that such a pattern had existed. On this basis, the evidence found in the east bedroom in the morning must be suppressed.

Moreover, neither with respect to the consent by Elaine Marshall in the afternoon nor the consent by Gayle Graff in the morning to a search of the east bedroom, can I accept the "reasonable appearances" test. The government argues that the only justification for the exclusionary rule is to "penalize police officers who have acted improperly." I agree that deterrence of improper police practices in the future is one of the hoped for consequences of the exclusionary rule.[2] But I consider that the exclusionary rule has another wholesome purpose. Whether or not the effect of excluding evidence in this case is to deter the police from unlawful searches in future cases, defendant is entitled to have it excluded simply

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[2] In the view I take of the motion, it is unnecessary to determine whether it is proper police practice to refrain from applying for a search warrant and, some seven hours after defendant's arrest, to attempt to justify a search on the basis of consent, without careful preliminary inquiry into the facts upon which the validity of the consent will ultimately depend.

because it was obtained in a warrantless search, which had not been consented to by him or by anyone who had a right, in fact, to bind him by her consent. It must be the true, factual relationship between the defendant and the consenter, rather than the apparent relationship, which controls.

Applying the test of reality here, rather than the test of appearance, there is no evidence, admissible as against the defendant, that there was any relationship between him and Gayle Graff, other than that of friends, both of whom were living in her parent's home. Extra-judicial admissions by her on the subject are not binding against him, as to their truth. Also applying the test of reality, rather than the test of appearance, I have found as fact—not controverted in this record—that the defendant was a paying tenant in the room. Thus, on the hard record here, this defendant cannot be bound by consent given either by his lessor, Elaine Marshall, or his friend, Gayle Graff.

The government argues that if the court should decide to apply the reality test, rather than the appearance test, it is the defendant's burden to prove the real relationship between him and the consenter. As I have indicated, even if this burden is the defendant's, he has met it with respect to the lessee-lessor relationship between him and Elaine Marshall. However, this burden should not rest on the defendant. When law enforcement officers choose to forego the search warrant procedure and to depend, instead, upon consent given by someone other than the person against whom the evidence sought will be used, and when the validity of that consent is later challenged, it is reasonable that the government should bear the

burden of proving that the relationship of the consenter to the accused was in fact a relationship which justifies making the consent binding upon the accused. Neither with respect to the consent by Elaine Marshall nor the consent by Gayle Graff has the plaintiff met this burden.

Finally, the government has requested that if the court should decide that the test of reality is to govern and that the government bears the burden of proving the actual relationship between the consenter and the defendant, then the hearing should be resumed to permit the government to meet this burden. Under the circumstances, I consider the request reasonable. The "circumstances" are that during the course of the two evidentiary hearings already held on the suppression motion, neither counsel for the government, nor counsel for the defendant, nor the court enjoyed a clear understanding of the test which would be applied in determining the validity of the consents, nor of where the burden of proof would be placed.

Accordingly, provision is made in the following order for a resumed hearing if the government desires one.

ORDER

IT IS ORDERED that the motion to suppress those items discovered and seized in the east bedroom of the Marshall house on November 12, 1970, is hereby granted; the said items are to be returned to the defendant.

IT IS ORDERED that the motion to suppress any other item discovered and seized in the Marshall house of November 12, 1970, is hereby denied.

This order shall become effective on the 11th day after its entry; provided, however, that if within said the holding of said evidentiary hearing and a further evidentiary hearing on the suppression motion, the effective date of this order shall be stayed, pending the holding of said evidentiary hearing and a further ruling by the court thereafter.

Entered this 28th day of May, 1971.

By The Court:

JAMES E. DOYLE,
District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1355

UNITED STATES OF AMERICA,

Petitioner

—v.—

WILLIAM EARL MATTLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 6, 1973
CERTIORARI GRANTED MAY 29, 1973

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1355

UNITED STATES OF AMERICA,

Petitioner

—v.—

WILLIAM EARL MATTLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DOCKET ENTRIES

DATE	PROCEEDINGS
2/11/71	Filed indictment.
2/12/71	Warrant not issued at direction of U.S. Atty.
3/ 1/71	Filed letter from apptd. atty. Rikkers that he consents to the substitution of another attorney for the deft.
3/ 1/71	Called for hearing. Appearances: John O. Olson, U.S. Atty., atty. for pltf. Donald S. Eisenberg, prospective apptd. atty. for deft. Deft. present in person. It is ordered that Mr. Eisenberg is now apptd. atty. to represent deft., in each of these cases, and terminating Mr. Rikkers appointment.
3/ 1/71	Filed order appointing counsel.
3/ 5/71	Called for hearing. Appearances: John O. Olson, U.S. Atty., atty. for pltf. Donald S. Eisenberg, Court-apptd. atty. for deft. Deft. present. Deft. arraigned, but with certain conditions. See notes. Deft. arraigned and enters plea of not guilty. Motion by deft. to be enlarged on bail as previously set by the Court. Deft. enlarged on bail with conditions that deft. is to remain in the Western Dist. of Wis. and N. Dist. of Ill. unless prior permission is granted and Mr. Richard R. Nelson of Chicago will advise the FBI immediately if he fails actually to see the deft. for more than 24 hrs. at any one time. Filed bond.
3/18/71	Filed notice and motion of deft. to suppress evidence.
3/24/71	Filed deft's motion for subpoenas for indigent deft.
3/24/71	Filed order for the issuance of subpoenas for material witnesses in behalf of deft. and the Marhal [sic] is directed to serve the subpoenas and advance fees.
3/30/71	Filed subpoena issued to Mrs. Elaine Marshall.

DATE	PROCEEDINGS
3/30/71	Filed subpoena issued to Mr. Arman Ohnessorge.
4/ 5/71	Called for hearing on defense motions. Appearances: John O. Olson, U.S. Atty., atty. for pltf. Donald S. Eisenberg, Court-apptd. atty. for deft. Deft. present. All witnesses except Mr. Hunter are to remain outside the courtroom during the hearing until they are called. Evidence offered on behalf of deft.: Mr. Alan Thompson instructed by the Court that he is not to discuss with other Govt. witnesses any of the testimony given in court. Armin Ohnesorge, Gregg B. Hunter, Edward M. Radtke, Gary Cross, Elaine Marshall, and Gayle Graff called as witnesses on behalf of deft. Motion by Mr. Eisenberg that Gayle Graff be granted immunity from prosecution denied. William Earl Mattlock, deft., called as a witness. Defendant rests. Defense moves that the Court grant his motion to suppress. Armin Ohnesorge, Edward M. Radtke and Gregg Hunter called as witnesses on behalf of plaintiff. Hearing adjourned to 4/13/71 at 2:00 pm.
4/ 6/71	Filed eight subpoenas.
4/ 6/71	Filed order appointing counsel.
4/13/71	Called for furthering [*sic*] hearing. Appearances: John O. Olson, U.S. Atty., atty. for plaintiff. Donald S. Eisenberg, Court-apptd. atty for deft. Deft. present. Frederick T. Rikkers, Court-apptd. atty for Gayle Graff. Motion by Mr. Eisenberg to quash any further proceedings in any respect except the football game here: was there an illegal search and seizure, and did in fact Gayle Graff give her consent or could in fact she give her consent? and motion that anything else be not permitted. Further evidence: William Earl Mattlock, Gayle Graff and Elaine Marshall recalled for further cross examination. Joel M. Sanders, called as a witness on behalf of pltf. Pltf. rests. Richard R. Nelson called as a witness on behalf of deft. Defendant rests. Evidence closed. Taken under advisement.

DATE	PROCEEDINGS
4/13/71	Filed clerk's copy of the stenographic transcript of proceedings on 4/5/71.
4/14/71	Filed order inviting arguments on certain questions.
5/28/71	Filed opinion and order granting motion to suppress those items discovered and seized in the east bedroom of the Marshall house on 11/12/70 and the items to be returned to deft, denying motion to other items in the house seized on 11/12/70.
6/ 3/71	Filed request for evidentiary hearing.
6/ 7/71	Filed clerk's copy of stenographic transcript of proceedings held on 4/13/71, & 4/5/71.
6/ 7/71	Filed clerk's copy of stenographic transcript of proceedings held on 4/13/71.
6/14/71	Filed subpoenas. (9)
6/22/71	Called for further hearing on deft's motion for suppression of evidence. Appearances: John O. Olson, U.S. Atty., atty. for pltf. Donald S. Eisenberg, Court-apptd. atty. for deft. Further evidence on behalf of pltf; Kathryn Ann Derezick, Susan Doucette, Mary Caroline Cupery, Clarke Gilbert Cupery, Durwent Millard, Jr., Leslie Wayne Cross, Donald L. Graff, Gary Cross, Edward M. Radtke, Armand Ottnsage [*sic*] and Mrs. Walter Marshall called as witnesses on behalf of pltf. Plaintiff rests. Defendant rests.
6/22/71	Filed interim opinion.
6/29/71	Filed subpoena issued to Kathryn Derezeck.
7/14/71	Filed clerk's copy of the stenographic transcript of proceedings held on 7/22/71 [*sic*: should read "6/22/71"].
1/ 4/72	Filed steno. trans. of proceedings on 4/5/72 [*sic*: should read "4/5/71"]. (Taken from 71-CR-79, U.S. v. Graff).

DATE	PROCEEDINGS
1/ 4/72	Filed steno. trans. of proceedings on 4/13/72 [*sic*: should read "4/13/71"] (Taken from 71-CR-79, U.S. v. Graff).
3/ 9/72	Filed opinion and order denying deft's motion to suppress except for the evidence obtained from a search of the east bedroom of the Marshall home and that will not be received at the trial of deft.
3/29/72	Filed plaintiff's notice of appeal for [*sic*] the order entered 3/9/72. Copy mailed to deft. and his at-attorney. Copy mailed to 7th Circuit.
5/ 5/72	Filed motion and supporting affidavit to extend time to file appeal record.
5/ 5/72	Filed order granting Govt.'s motion for extension of time to file appeal record.
6/ 8/72	Filed stenographic transcript of proceedings held on 6/22/72 [*sic*: should read "6/22/71"]
6/ 8/72	Record on appeal forwarded to Clerk of U.S. Court of Appeals for the Seventh Circuit.

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 71-CR-13

UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

WILLIAM EARL MATTLOCK, DEFENDANT

STENOGRAPHIC TRANSCRIPT

of testimony had upon hearing in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable JAMES E. DOYLE, Judge, presiding, on Monday, April 5, 1971, commencing at 8:45 o'clock in the forenoon.

APPEARANCES:

JOHN O. OLSON, United States Attorney, Madison, Wisconsin, appeared on behalf of the plaintiff.

DONALD S. EISENBERG, Attorney at Law, Madison, Wisconsin, appeared on behalf of the defendant.

The defendant, William Earl Mattlock, was present in person.

* * * *

[2] MR. EISENBERG: I call Mr. Ohnesorge.

ARMIN OHNESORGE,

called as a witness by the defendant herein, having [3] been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. EISENBERG:

Q State your name and address here.
A Armin Ohnesorge, Rural Route 2, Pardeeville.

Q What is your occupation?
A I am a traffic captain for the Columbia County Sheriff's Department.

* * * *

[4] Q Were you involved in an investigation concerning the defendant, William Earl Mattlock, in November of 1970?
A Yes, sir.
Q In what capacity were you involved in that investigation?
A I did assist in the investigation as a deputy sheriff.
Q Who called you to assist?
A The dispatcher by radio. I was advised to assist in [5] the investigation.

* * * *

Q Did you proceed directly to the Marshall farm?
A Yes, yes, we did.

* * * *

[6] Q And when you arrived there, who, if anyone, was there?
A Do you want me to name all the people that I know was there?
Q How many people were there?
A Eight or ten people.
Q And what department, if any, were these people with?
A Our department and constable from the Village of Wyocena.
Q Was the automobile which was described to you present at the time you arrived?
A Yes, sir, it was.
Q Did you see the defendant, William Earl Mattlock, at that time?
A Yes, sir, I did.
Q Where was he?
A He was sitting in one of the officer's cars.
Q Was he handcuffed?
A I don't know.
Q Did you ever go up to the defendant to see whether or [7] not he was handcuffed?

A No, sir, I didn't.
Q What did you do when you arrived?
A I went over to Officer Cross and Officer Radtke, and they informed me that—
Q I don't care what they informed you. I want to know what you did.
A I went over to Officer Cross and Officer Radtke and asked them what happened up to this point.
Q To your knowledge, had they already been into the Marshall residence?
A No, sir, they had not been.
Q How much prior to the time that you arrived there, if you know, had Officers Cross and Radtke arrived?
A Let's say in the area of five or ten minutes.
Q Did you at any time talk to the defendant, William Earl Mattlock, prior to entering the home?
A No, sir, I did not.
Q And as of that time that you arrived, to your knowledge no one had yet entered the home?
A That's correct; they had not.
Q What, if anything, did you do then?
A We walked from the Westbush Road—and it is a road that runs parallel with the home—had our vehicles [8] parked there. We walked up to the house.
Q How many feet was that approximately?
A 150, 200.
Q Now, when you say "We walked up to the house", who was with you?
A Officer Radtke and Officer Cross.
Q Anyone else?
A Not that I recall.
Q All right. Then what did you do?
A Went up to the door and knocked.
Q Anyone come to the door?
A Yes, sir.
Q Who?
A I believe it was a young boy.
Q How young?
A Ten, twelve years old.
Q All right. What, if anything, did you say to him?
A I asked if his mother was home.

Q And what did he say?
A That she wasn't.
Q Then what did you do?
A Then he also stated that his sister was; and I asked the boy if I could talk to his sister.
Q Did his sister then come to the door?
[9] A Yes.
Q What time of the day was this?
A I would say in the vicinity of 9:30.
Q In the morning?
A That's correct.
Q All right. Did the sister come to the door?
A Yes.
Q What happened then, if anything?
A I asked her if I could come in.
Q And what did she say?
A Yes.
Q And did you then walk in?
A Yes, I did.
Q Did she ever object to your entering the premises?
A No.
Q Did you inquire whether the premises were hers?
A No.
Q Did you inquire whether or not the defendant, William Earl Mattlock, lived in those premises?
A Yes, sir, I did.
Q Who did you inquire from?
A The girl, Mrs. Graff.
Q When did you do that?
A A short time after I entered the home.
[10] Q Where were you when you asked her that question?
A Standing in the kitchen.
Q And where was she?
A Standing in the kitchen.
Q Where were Officers Cross and Radtke?
A Aside of me in the kitchen.
Q Then what happened?
A Then I asked her if I could search the home.
Q And what did she say to that?
A She consented, yes.

Q She consented. What did she say, Officer?
A She said yes, we could search the home.
Q What exactly did you say to her?
A I asked her if I could search the home.
Q And she said, yes, go ahead and search the home?
A Yes. She said I have nothing to hide.
Q How old is Mrs. Graff?
A I would say in her early twenties.
Q Did you ask Mrs. Graff whether or not the defendant lived in that home?
A Yes, sir, I did.

• • • •

[12] Q Did you know which room in the house was occupied by the defendant, William Earl Mattlock?
A When I entered the house?
Q Yes.
A No, I did not.
Q Did you ever ask the defendant, Mr. Mattlock, permission to search his room?
A No, sir, I did not.
Q Did he in fact have a room in that house?
A Yes, he did.
Q And did you in fact search that room?
A Yes, sir, I did.
Q Did you have a search warrant?
A No, sir.
Q Did you or any other officers to your knowledge at any [13] time attempt to obtain a search warrant?
A We did not.
Q Now all during this time the defendant was in the squad car; is that correct?
A I believe so, yes.
Q Did you feel that your life was endangered in walking into that house?
A No, sir, I did not.
Q At any time did you feel that your life was endangered?
A No, sir.
Q What time did you leave the premises?
A I would say in the area of 10:00 o'clock; in the vicinity of 10:00 o'clock.

Q Did you return at any time to the Marshall home?
A Yes, sir, I did.
Q What time was that?
A Pardon me. When I mentioned 10:00 o'clock—Yes, I returned. I went out to the squad car. Then I returned to the Marshall home again within a matter of two or three minutes.
Q What did you go out to the squad car for?
A Went out to the squad car and we were going to leave and Officer Radtke—
Q I don't want to know what someone else told you. I [14] want to know what you did.
A I went out to the squad car and talked to Officer Radtke.
Q And then you went back into the house?
A Yes, sir.
Q Now, prior to that time did you take anything from the home?
A Yes, sir, I did.
Q What did you take?
A I took a bag of money.
Q And where did you find the bag of money?
A Upstairs, east bedroom of the home in a closet.
Q And was that the defendant's bedroom?
A Yes, sir.
Q It was identified to you as his bedroom?
A His and Gayle Graff's bedroom.

* * * *

Q Did you have permission to go back in the house a second time?
A Yes, sir, we did.
Q From whom?
[15] A Gayle Graff.
Q Did she protest to your coming into the house at that time?
A No, sir, she did not.
Q Where was she?
A I knocked on the door and she met us at the door.
Q You had to knock again; is that right?
A That's correct.
Q All officers had left the house by that time?

A Yes, sir.

Q And she graciously allowed you to come back into the kitchen?

A That's correct.

Q Did she ask any time to go out to the car to see Mr. Mattlock?

A Not that I recall.

Q She just said, go take whatever you want; is that right?

A No, she did not.

Q What did she say?

A I asked her if we could search the pantry area and she stated we could.

Q And you then searched the pantry area?

A Yes, sir.

[16] Q Do you know whether or not Gayle Graff owned that house?

A No, sir, I did not.

* * * *

[20] Q Did Mrs. Marshall say anything to you after you entered the house?

A I believe she said—She gave us permission to go upstairs and go into the bedroom for another search.

Q You asked her permission and she said, go right ahead; is that what happened?

A No, one of the other officers did.

Q In your presence?

A Yes.

Q What exactly did he say?

A He asked her to sign a consent slip to search, which she did; and also asked her if we could search the bedroom.

Q And she said, go right ahead and search the bedroom?

A That's correct. She was very cooperative.

Q Did she tell you which bedroom belonged to William Earl Mattlock?

A I don't believe she told me that, no.

Q Did you inquire as to whether or not William Earl Mattlock paid room and board for that home?

A I didn't know.

Q Did you know whether or not he did?
A No, sir; I did not.
Q Isn't it a fact that Mrs. Marshall had a diabetic
[21] attack while you were there?
A It is unbeknown to me. I don't recall any.
Q And the only officers were Cross, Radtke and the F.B.I. agent beside yourself?
A No. Radtke and another agent and Gregg Hunter and myself.
Q Just the four of you?
A Yes, sir.
Q And she told you, search wherever you want?
A She told us we could search the bedroom.
Q Did you find anything in the bedroom at that time?
A Yes, sir. I didn't find it; no, sir. I did not.
Q Did any agent or officer with you find anything?
A Yes, sir.
Q What?
A Five $100 bills.
Q And in whose bedroom were they found?
A In the upstairs east bedroom.
Q That would have been Mr. Mattlock's bedroom; is that correct?
A Yes, sir.
Q Did you then leave the premises?
A Yes, sir.
Q Did you ever go back another time?
[22] A No, sir, I don't believe I did.
MR. EISENBERG: I have no further questions.

CROSS EXAMINATION

BY MR. OLSON:

• • • •

[23] Q When did you first ask her [Mrs. Graff] if you could search?
A Right after we entered the kitchen area the initial time.
Q And tell us again what her response was?
A She was very cooperative and stated we could search the home.

Q And what did you do after she told you that?

A We asked her where Mr. Mattlock—where his bedroom was. Pardon me.

First we did look at the pantry area and we walked through the living room onto the front porch, came back into the kitchen. And then we asked where Mr. Mattlock's bedroom was—where he slept.

Q Did she indicate to you whether there was any relationship between herself and Mr. Mattlock?

MR. EISENBERG: Objection, leading.

MR. OLSON: It is cross examination, Your Honor.

THE COURT: Overruled.

THE WITNESS: No, sir, she did not. I assumed it was her husband.

MR. EISENBERG: Objection, ask that the [24] assumption be stricken.

THE COURT: The motion is granted, and I will disregard the assumption.

BY MR. OLSON:

Q All right. Did she indicate to you where Mr. Mattlock slept?

A Yes, sir, she did.

Q Did she indicate whether or not anyone else slept in that bedroom?

A She stated she slept in the same bed.

Q In the same what?

A Same bed.

Q Was there any discussion about how that bedroom was divided or if there was any division of the room?

A No, sir, there was not as I recall.

Q Were there any other openings off that bedroom?

A No, sir. There was one door.

Q Was there any wardrobes, closets or anything like that?

A Yes, there was one. As you walked in the room there was one closet on the left wall—it would be the north wall.

Q A single closet?

A Yes, sir.

Q Did you look in there?

[25] A Yes, I did.

Q Did you find anything in there?
A Yes, sir. I found a diaper bag half full of money.
Q After you initially asked her to search the house, did you ever ask her for permission to search again while you were in the house on that first time?
A Yes, sir. After we asked her where the bedroom was, she took us up into the bedroom and Officer Radtke again asked her if we could search the bedroom; and she granted us permission to search.
Q He did that in your presence?
A Yes, sir.
Q And she responded in your presence?
A Yes, sir.
Q Now, after you found the bag of money, did you leave the house immediately?
A Yes, I believe we did.
Q And where did you go then?
A Then we went out to the area where Mr. Mattlock was being held in the car.
Q And subsequently you returned to the house; is that correct?
A Yes, sir.

• • • •

[56]

EDWARD RADTKE,

called as a witness by the defendant herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. EISENBERG:

Q State your name and address, please.
A Edward M. Radtke, 128 West Franklin Street, Portage, Wisconsin.
Q Are you employed with the Columbia County Sheriff's Department?
A Yes, sir.

• • • •

[57] Q All right. Did any other officers arrive at the scene at that time?
A Shortly thereafter.

Q How many?

[58] A I would say roughly five more.

Q So there were a total of eight of you then?

A Roughly.

* * * *

[61] Q Did you ask him whether or not he resided in the Marshall home where you arrested him or outside where you arrested him?

A Yes, sir, I believe I asked him his name which he stated at that time was William Mattlock and that he was staying at this residence.

Q Did you ask him where in the residence he was staying?

A No, sir.

[62] Q Did you ask him whether or not he paid rent or room and board to stay there?

A No, sir.

Q Did you ask him anything else at that time prior to turning him over to Officer Hucker?

A I don't believe I did.

Q What did you do then?

A I proceeded to the rear of the home.

Q With whom?

A I believe I walked by myself up to the rear where there was other officers.

Q When you got to the rear door, did any other officers join you?

A Yes, sir. There were roughly four other officers.

Q What, if anything, did the five of you do then?

A Three of them stayed outside and—Two. Two uniformed officers stayed out, I believe, and three of us went into the home.

* * * *

[64] Q All right. Did you ask anyone for specific permission or authority to search?

A I believe I did ask Gayle Graff where William was sleeping, so on and so forth.

Q And what did she say?

A And I believe she stated that he was sleeping in an upstairs bedroom which is also occupied by her.

Q Did you then go up to that bedroom?

A Yes, sir, we did.
Q Did you ask her permission to enter that bedroom?
[65] A Yes, sir.
Q What did she say?
A Yes, you can search; I have nothing to hide.
Q Did she tell you that she had a bedroom on the first floor?
A No, sir.
Q Did you inquire whether or not she had a bedroom on the first floor?
A No, sir.
Q Did you inquire whether she had a bedroom anyplace else in that house?
A No, sir.
Q And in effect she said, I am sleeping with him in that bedroom; is that correct?
A Words to those effect.
Q Words to that effect. Did you ask Mr. Mattlock any time to search that bedroom?
A No, sir, I did not.
Q Did anybody in your presence ask him permission?
A In my presence, no.
Q Did you then search that bedroom?
A Yes, sir.

* * * *

[72] Q Did you at any time in this particular matter attempt to obtain a search warrant prior to searching the Marshall home?
A I, no.
Q Did anyone to your knowledge attempt to obtain a search warrant?
A To my knowledge?
Q Yes.
A No.
Q You already had the defendant in custody immediately upon arriving at the house, did you not?
A Yes, sir.
Q Did you know of any grave emergency to enter that premises without a search warrant at that time?
[73] A At this particular time?
Q At the time you first entered the house.

A I have to answer no.

* * * *

[75]

GARY CROSS,

called as a witness by the defendant herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. EISENBERG:

Q State your name and address, please.
A Gary Cross, Route 1, Portage, Wisconsin.
Q With whom are you employed?
A The Columbia County Sheriff's Department, Portage, Wisconsin.

* * * *

[77] Q Did you ever ask Mr. Mattlock permission to enter that house?
A Did I?
Q Yes.
A No, sir.

* * * *

[79] Q And did you just go from room to room searching at will?
A I stayed primarily in the kitchen.
Q And the Captain went throughout the house?
A The lower level, yes, sir.
Q Did he ask any specific permission to enter any specific room?
A Yes, sir.
[80] Q Each room he asked permission?
A No, sir.
Q Well, which specific rooms did he ask permission?
A He asked permission to look in the bedroom.
Q That was the downstairs bedroom?
A No, sir.
Q Well, now we are upstairs; is that right?
A No, we are downstairs. He asked while he was downstairs.

Q I see, okay. Downstairs he said, Mrs. Graff, may I look in the bedrooms upstairs?

A I believe he asked where her bedroom was and she said, "Upstairs"; and I believe he then asked if the defendant slept in that bedroom and her reply was, "Yes".

Q And then did he say, may I look into the bedroom?

A Yes.

Q And she said, "Go right ahead"?

A Yes.

Q And still at this time he hadn't told her why he was there?

A Not that I heard, no, sir.

Q And you didn't tell her either?

A No, sir.

Q Did you at any time prior to this seek a search warrant [81] from anyone?

A No, sir.

* * * *

[83] Q Did you just walk into the premises at that time?

A No, sir.

Q Did you ask permission?

A Captain Ohnesorge asked permission.

Q Did Miss Graff at any time ask to go out to the car to see Bill?

A She didn't ask me, no.

Q Did she ask anybody in your premises [*sic*]?

A Not that I know of.

Q Now, up to this time, you still hadn't told her what you were looking for, did you?

A I hadn't, no, sir.

[84] Q And nobody in your presence told her, either?

A In my presence. Do you mean—

Q That you heard. Did you hear anybody say why you were there?

A Yes, sir, I did.

Q When was this?

A I believe when Captain Ohnesorge was upstairs.

Q After he had made his search of the bedrooms?

A I don't know if he made the search then or not.

* * * *

[85] Q Did you inquire as to who paid the rent for that house prior to any of the search?
A I did not.
Q Do you know who paid the rent in that house?
A I believe the Marshalls paid the rent at that house.
Q Do you know whether or not anyone paid room and board to live in that premises?
A No, sir.
Q Did you inquire as to whether anyone paid the Marshalls room and board?
A No, sir.

* * * *

[87]

GAYLE GRAFF,

called as a witness by the defendant herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. EISENBERG:

* * * *

[89] Q All right. What, if anything, did you observe when you went outside?
A By the time I got outside, all they did was grab Bill away and shove him in the car.
Q What did you say then?
[90] A I went back into the house.
Q Did you close the door?
A Yes.
Q Did anybody tell you to go into the house?
A Uh-huh.
Q Who?
A They told me to get away from him.
Q Who told you that?
A The officers did.
Q All right. And that is the reason you went back into the house?
A Yes.

Q What is the next thing that happened?
A I waited in the house, and then they came into the house.
Q Now, when you say "they", who is they?
A The officers came into the house.
Q How many?
A Four, I think.
Q Do you recall who they were?
A There were three—right there (indicating).
Q Cross and Radtke and Ohnersorge?
A Yes.
Q The three on this end?
[91] A Right.
Q Did they knock on the door prior to coming in?
A No.
Q Who walked in?
A They all did.
Q Just walked right in?
A Yes.

• • • •

[92] Q Did they tell you why they wanted to look around?
A No.
Q Did they tell you why they were there?
A No.
Q Did they then look around?
A Yes, they did.
Q Did they ever tell you they had a search warrant?
A No, they didn't.
Q Did they ask you if you owned or rented the premises?
A No, they didn't.
Q Did they ask you who you were?
A No.

• • • •

[93] Q Did they come back into the house or not?
A They sent one guy back in.
Q Did he knock on the door?
A No.
Q Did he just walk in?
A Yes.
Q Did he ask anything of you at that time?

A He told me I could comb my hair later, to come on; he wanted to go.
Q But where?
A Up to the jail in Portage.

• • • •

[95]

WILLIAM EARL MATTLOCK,

called as a witness on his own behalf, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. EISENBERG:

• • • •

[97] Q Did they at any time ask your permission to search the Marshall premises?
A No, they did not.
Q Did anyone at any time ask you permission to search the Marshall residence?
A No, sir.
Q Did you give anyone permission to search the Marshall residence?
A No, sir.

• • • •

[100]

GAYLE GRAFF,

recalled as a witness, having been previously duly sworn, was further interrogated and testified as follows:
[101]

CROSS EXAMINATION

BY MR. OLSON:

Q You understand you are still under oath?
A Yes.
Q When did you return to Wisconsin?
A In August.

• • • •

Q And when you returned in August, where did you live?
A With my mother and father.
Q Did anyone else live there?
A Uh-huh.
Q Who?
A Bill.
[102] Q Mattlock, the defendant?
A Right.
Q Is it a fair statement to say that after August, from August until November, that you and Bill lived together?
A I refuse to answer.
THE COURT: For what reason?
THE WITNESS: Fifth Amendment.
THE COURT: You will have to be a little more explicit.
THE WITNESS: On grounds that it may tend to incriminate me.

• • • •

[113] ARMIN OHNESORGE,

recalled as a witness by the plaintiff herein, having been previously duly sworn, was further interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. OLSON:

• • • •

[114] Q How did you get from the downstairs to that room?
A We asked Gayle Graff where the room was. She pointed upstairs and then she led us up to the room.

• • • •

Q Was there any discussion about the dressers?
A Yes, sir.
Q What was that discussion?
A When we went over to the dresser drawer, I asked her if this was her dresser or Bill's dresser.
Q And what did she say?

A She said "Bill has the two bottom drawers and the two top drawers are mine".

• • • •

[126]

GREGG B. HUNTER,

recalled as a witness by the plaintiff herein, having been previously duly sworn, was further interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. OLSON:

Q Your name?
A Gregg Hunter.
Q And you testified here earlier today?
A Yes, sir.
Q Do you understand that you are still under oath?
A Yes, sir.
Q On the date that's been in question here today, did you have an occasion to be present for the interview of Gayle Ann Graff?
A Yes, sir.
Q Where did that interview take place?
A It took place in Portage, Wisconsin, at the Columbia County Sheriff's office.
Q Approximately what time did it take place?
A It was in the early afternoon, around 12:00, 1:00 [127] o'clock—some time around there when it commenced.
Q Who conducted that interview?
A Joel Sanders and myself.

• • • •

[128] Q Did a discussion take place at that time regarding her relationship with the defendant?
A Yes, sir.
Q Tell us what took place.
A We asked her if she was married to him. She said—

MR. EISENBERG: Well, Your Honor, I am sorry to interrupt the witness. When we say "We", I would like to know who.

THE COURT: Will you respond to that question of counsel?

THE WITNESS: I did.

BY MR. OLSON:

Q What did you ask her?
A I asked her if she was married to Bill Mattlock.
Q What did she reply?
A She said, "No. I consider myself a common-law wife".

• • • •

---

[1]

STENOGRAPHIC TRANSCRIPT

of portion of testimony had upon hearing in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable JAMES E. DOYLE, Judge, presiding, on Monday, the 5th day of April, 1971, commencing at 8:30 o'clock in the forenoon.

• • • •

[3]

ELAINE R. MARSHALL,

called as a witness by the defendant herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. EISENBERG:

Q Would you state your name and address, please?
A Elaine R. Marshall, Route 2, Pardeeville.
Q Do you own the home located at Route, 2 Pardeeville?

A We rent it.

* * * *

[11] Q Do you recall any federal agents explaining any rights to you?

A No, they did not.

Q Did the federal agent or anyone else tell you that you had a right not to have your house searched?

A No, they did not.

* * * *

[12] Q Now that you have read it, do you understand what that means?

A Not really. I guess it means that they had permission to search the house.

Q That's what your understanding is?

A Yes.

Q Do you understand that that means that you didn't have to give them permission; or don't you understand that?

A I did not know that I could refuse to let them search the house.

Q Did they exhibit a search warrant to you at any time?

A No, they did not.

* * * *

[16] Q You just let him move into your house?

A When he moved Gayle up from Florida I gave him a room to stay in.

Q You gave him the room?

A Well, no. He paid me room and board; but I furnished a room. I should put it that way to you.

Q All right. How much room and board did he pay you?

A $25 a week.

Q And was he current on his payments in November?

A Yes.

* * * *

---

[1]

STENOGRAPHIC TRANSCRIPT

of testimony had upon hearing in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable JAMES E. DOYLE, Judge, presiding, on Tuesday, April 13, 1971, commencing at 2:00 o'clock in the afternoon.

• • • •

[20]

JOEL M. SANDERS,

called as a witness by the plaintiff, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. OLSON:

Q Your name?
A Joel M. Sanders.
Q Your occupation?
A Special Agent, F.B.I., New York Office.

• • • •

Q Do you recall November 12, 1970?
A Yes, I do, sir.
Q Do you recall where you were in the early afternoon of that day?
A Yes, I do.
[21] Q And where was that?
A At the Columbia County Sheriff's office in Portage, Wisconsin.
Q Did you have an occasion to meet Gayle Graff on that date?
A Yes, I did, sir.
Q Did you have an occasion to interview her on that date?
A Yes. I, along with Special Agent Gregg B. Hunter, interviewed her in the Captain's office at the Sheriff's Department.

• • • •

[23] Q Was there any conversation about her return trip to Wisconsin?

A Yes, there was.

Q What was that conversation?

A Gayle Ann Graff stated to me that both she and Bill Mattlock returned in his automobile to Wisconsin sometime in the late summer of 1970 to her mother's house in Pardeeville, Wisconsin.

Q Did you have any discussion with her regarding her relationship with the defendant?

A Yes, sir, I did.

Q What was that discussion?

A She said that she was his common-law wife. She also said that she was not married to him.

• • • •

[24] Q Did you have occasion to discuss with her whether or not she had seen the defendant on that day?

MR. EISENBERG: What day?

THE WITNESS: Yes, I did, sir.

MR. OLSON: On the day that you interviewed her.

THE WITNESS: Yes, I did.

BY MR. OLSON:

Q Tell us about that conversation?

A Gayle Ann Graff stated to me that both arose at the same time that morning from bed and that she had seen him only wearing shorts that morning.

She said that he had gone downstairs and was out of the house at the time that the Sheriff's Department officers came to the house and arrested him.

She also stated that both of them usually [25] arose from bed at approximately 10:00 or 11:00 o'clock a.m., each morning.

• • • •

[30]

CROSS EXAMINATION

BY MR. EISENBERG:

• • • •

Q How, at the time that you interviewed Mrs. Marshall [31] and Mrs. Graff, did you know at that time

that there was going to be a motion to suppress evidence in this case?

A No, sir.

Q Did you at any time, at the time of the interviews, have anything in your mind concerning a search warrant or a lack of one?

A No, sir.

Q Did the question of search warrants ever enter your mind prior to these motions being brought?

A No, sir.

Q Do you know what a search warrant is?

A Yes, sir.

* * * *

[1]

STENOGRAPHIC TRANSCRIPT

of testimony had upon hearing in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable JAMES E. DOYLE, Judge, presiding, on Tuesday, the 22nd day of June, 1971, commencing at 9:00 o'clock in the forenoon.

* * * *

[26]

MARY CAROLINE CUPERY,

called as a witness by the plaintiff herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. OLSON:

Q Would you tell the Court your full name, please?

A Mary Caroline Cupery.

Q Your occupation?

A Housewife.

Q Do you have any other occupation?

A Not at the present time. We were running a restaurant.

Q When did you run a restaurant?

A Up until June of this year. June 1.
Q And what restaurant was that?
A The Speedway Restaurant.
Q And where is that located?
A South of Portage four miles.
Q How long did you operate that restaurant?
[27] A Nearly two years.
Q When you say "we", who do you mean?
A My husband and I.
Q Now in the operation of that restaurant did you ever hire outside help?
A Oh, many times.
Q Do you see anyone in court today that you hired during that period of time?
A Yes, two people.
Q Who are they, please?
A Gayle and Bill.
Q And Gayle's last name?
A Graff.
Q And Bill's last name?
A Mattlock.
Q When did you hire Bill Mattlock?
A It was in September after Labor Day.
Q Last year?
A Yes.
Q And what about Gayle Graff?
A Well, she came first. I can't remember the exact date, but it was right after Labor Day.
Q Is it fair to say then that you hired both of them within a short period of time?
[28] A Yes, they both worked for about two weeks.
Q At the time they came to work was there any representation made as to their relationship?
A Well, we just assumed that—
MR. EISENBERG: Objection; ask that it be stricken.
THE COURT: The motion is granted.
MR. OLSON: All right.
BY MR. OLSON:
Q What name did Gayle give?

A Graff.

Q And did she have any explanation for using the name Graff?

A I didn't feel it was my business and I never asked her.

Q Okay. Now did there come a time when the employment terminated?

A Yes.

Q Tell us about the circumstances surrounding the termination?

A Well, I remember it was a—

MR. EISENBERG: Objection, your honor, [29] immaterial and irrelevant, no proper foundation.

THE COURT: The objection is overruled and I will take it subject to a motion to strike if it proves irrelevant.

THE WITNESS: I remember that it was a Saturday night and we were looking forward to a busy Sunday. And all of a sudden Bill said, My wife won't be in to work tomorrow. I said, why not; and he said, My wife is not going to work all these hours. She was supposed to work only three days a week and you have been working her for six. And he said, And furthermore I won't be working anymore after tonight either.

BY MR. OLSON:

Q Now on the following day did Bill Mattlock appear?

A No.

Q Did anyone else fail to appear?

A Gail failed to appear.

Q Was there anyone else that was employed in your restaurant that he could have been referring to as "my wife"?

A No.

MR. OLSON: Thank you.

[30]

CROSS EXAMINATION

BY MR. EISENBERG:

Q Now, Mrs. Cupery, when did the FBI first contact you?

A I don't remember the exact day; I think it was in May sometime.

Q Back in May. And how many times since May to the present time have they talked to you?

A One other time.

Q And who talked to you?

A The blonde gentleman; I don't know his name.

Q Mr. Hunter?

A If that's his name; I don't know.

Q And what did Mr. Hunter ask you?

A He asked me if Gayle had ever signed anything "Mattlock" and I said "No".

Q She never signed anything "Mattlock", did she?

A No.

Q And she went under the name of Gayle Graff, didn't she?

A Yes.

Q Your answer is "right"?

A Yes.

Q Now isn't it a fact that William Mattlock said, [31] Gayle won't be in to work tonight?

A No, he said "My wife".

Q And how do you remember that he said "My wife"?

A Because I was puzzled as to their relationship.

Q What puzzled you about it?

A Well, in the time book where we keep track of who worked how many hours they were going under separate names and yet they seemed to be living together.

Q They seemed to be living together. They seemed to be friends, didn't they?

A Yes.

Q Did you ever see them in bed together?

A Heavens no.

Q Did you ever see them living together as husband and wife?

A No, I was never in their home.

Q And outside of the one time that you allege that he said "My wife won't be in tonight", at no other time did he ever refer to her as Gayle Mattlock or as his wife?

A No.
Q Nor did she ever refer to herself as his wife?
A Not that I know of.
Q Did the gentleman from the FBI or the police [32] department who contacted you ask you several questions about whether or not Mr. Mattlock ever used the words "My wife"?
A Well, yes.
Q He said that quite a few times, didn't he?
A Yes.

• • • •

RECROSS EXAMINATION

[33]

BY MR. EISENBERG:

Q Did you pay by check?
A Yes.
Q And did you pay Gayle Graff a check in the name of Gayle Graff?
A Yes.
Q And how many checks did you give her?
A One, I believe.
Q Did you ask her a second time what her proper name was?
A Well, that's the name she gave me and the Social Security Number she gave me.
Q And her Social Security Number was in the name of Graff also, wasn't it?
A Right.

• • • •

[34]

CLARKE GILBERT CUPERY,

called as a witness by the plaintiff herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. OLSON:

Q Would you tell the court your full name, please?
A Clarke Gilbert Cupery.

Q And you have been in court this morning throughout this hearing?

A Just about all of it. I missed the first part of it.

Q Did you hear all of the testimony of the previous witness?

A Yes.

Q And are you related to that witness?

A She is my wife.

Q How long have you been married?

A Ten years.

Q Is it correct that up until sometime in this month or the first of this month that for two years prior to that or nearly that long you were running the Speedway Restaurant?

[35] A That is right.

Q And do you recall the defendant, Bill Mattlock?

A Yes I do.

Q And do you know Gayle Graff?

A Yes.

Q Do you recall when you first meet [*sic*] these people?

A I don't remember the exact date but I think it was around September when they worked for us in the restaurant.

Q And do you recall how they were introduced to you?

MR. EISENBERG: Objection. There is no showing that anybody introduced them.

MR. OLSON: There is a showing that they worked for him, Mr. Eisenberg.

THE WITNESS: They applied for a job separately.

THE COURT: The objection is overruled and the answer may stand.

BY MR. EISENBERG [*sic*]:

Q They applied for a job separately?

A Gayle applied first and then Bill applied.

Q Did you ever have any conversation relating to the Social Security Account of Gayle Graff?

A Yes.

[36] Q Could you tell us about that?

A Well, something came up at one time about Gayle said something about her husband didn't want her to

work this many hours, only three days a week and everything else. And I said something about the name "Graff" and the name "Mattlock". And she said it had something to do with Social Security or something and I didn't catch it. And I didn't pay any attention to it or dig into it because when waitresses work for you you don't ask too many questions.

MR. OLSON: Thank you. That's all.

CROSS EXAMINATION

BY MR. EISENBERG:

Q Gayle always went under the name of Graff, didn't she?

A That's correct.

Q And Mattlock always went under the name of Mattlock, didn't he?

A That's right.

Q Did he ever say, This is my wife Gayle?

A Not those exact words, no.

Q Did she ever say, This is my husband William or Bill?

A Yes.

[37] Q When?

A When Bill was hired.

Q Oh. And where were you at that time?

A In the restaurant behind the counter.

Q And what did she say?

A She said, Why don't you give my husband a job.

Q And did you ask her at that time why she was going under the name of Graff?

A It was shortly thereafter, yes.

Q And she continued to go under the name of Graff?

A Right.

Q And you paid her under the name of Graff?

A Right.

• • • •

[38]

DURWARD MILLARD, JR.,

called as a witness by the plaintiff herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. OLSON:

Q Would you tell us your full name, please?
A Durward Millard, Jr.
Q Where do you reside?
A Route 2, Pardeeville.
Q Are you acquainted with the location of the Walter Marshall residence?
A Yes.
Q Where is that in relation to where you reside?
A Neighbor.
Q Have you been there on occasion?
A Yes.
Q On more than one occasion?
A Yes.
Q How many times would you estimate that you have been there?
[39] A Just several times.
Q Are you a frequent visitor there?
A Yes.
Q And how long a period of time has that been going on?
A A long time; I don't remember how long.
Q Would it be more than a year?
A Yes.
Q Perhaps more than five years?
A I would say yes.
Q Are you presently acquainted with Bill Mattlock?
A Yes.
Q Do you recall when you met him?
A It was last fall sometime.
Q And where were you when you met him?
A Down at the Marshalls'.
Q Who introduced him if anyone?

A I don't remember for sure which one it was, if it was Gayle or one of the Marshalls.
Q Do you recall the introduction?
A Yes, just being introduced.
Q How was he introduced to you?
A I believe it was just as Bill.
Q Was there any reference made to you what Bill was doing there?
[40] A No.
Q Was he identified in any way?
A Was he?
Q Yes.
A Not that I remember.

• • • •

[41] Q Did you ever have an occasion to see Gayle and Bill Mattlock together?
A Yes.
Q On how many occasions?
A Several times.
Q How would Mr. Mattlock refer to Gayle?
A As Gayle.
Q Did he ever use any nicknames?
A Not that I can say for sure.

• • • •

[42]

LESLIE WAYNE CROSS,

called as a witness by the plaintiff herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. OLSON:

• • • •

[43] Q Are you acquainted with the Walter Marshall residence?
A Very well.

• • • •

Q Since August of 1970 have you has [*sic*] occasion to visit that home?
A I have.

Q Have you ever had an occasion to meet the defendant, Bill Mattlock?
A I was introduced to him.
Q Who introduced you to him?
A Mrs. Marshall.
Q Where did that introduction take place?
[44] A The Marshall residence.
Q When she introduced you to him how did she introduce him?
A She said I would like to have you meet Gayle's husband.
Q And who did she introduce you to?
A To Bill Mattlock.
Q Did he deny at that time that he was her husband?
A No.
Q Were there any disclaimers on his part at all?
A None.

• • • •

[46]

CROSS EXAMINATION

BY MR. EISENBERG:

Q He was completely clothed when he came downstairs, [47] wasn't he?
A Yes sir.
Q And in fact he was painting the house at the time, wasn't he?
A He started to paint the house when he got downstairs.
Q And you don't know what he was doing upstairs prior to that time?
A I did not.
Q And you don't know whether or not he was living with Gayle at that time, do you?
A I do not.
Q Now are you, Mr. Cross, also a Deputy Sheriff with Columbia County?
A I am.

• • • •

[48] Q Now when were you present at the Marshall home when you were introduced to William Mattlock?

A Well, sometime in September, I believe.
Q When in September?
A Oh, approximately the middle of the month.

• • • •

[50] Q Now prior to November 12, 1970 did you tell anyone that Bill Mattlock was married to Gayle Graff?
A No.
Q And did anybody outside of Mrs. Marshall ever tell you that they were husband and wife?
A No.
Q And that's the only occasion that you have ever heard the words "This is her husband"?
A I thought that was enough.
Q You what?
A I though [*sic*] that was enough.
[51] Q And that's the only time you ever heard it?
A That's right.
Q And you never told any of your bosses on the Columbia County Sheriff's Department?
A No, never.
Q And on November 12 were you present when William Mattlock was arrested?
A No.
Q Were you contacted at all that day by any members of the Sheriff's Department or the FBI?
A No, I can't say that. I was in the restaurant eating when I was notified that the bank had been held up. Who called me I do not know.
Q Did anybody at any time prior to Mr. Hunter contacting you a couple weeks ago—Did you ever tell anybody that they were husband and wife?
A No.
Q Did you ever see them sleeping together?
A No.
Q Did you ever see them come out of the same bedroom together?
A I saw Gayle come downstairs and a few minutes he came down.
Q Did you ever see them come out of the same bedroom [52] together?
A I did not.

Q Did you ever see them go into the bedroom together?
A I did not.
Q Did Bill ever say "This is my wife, Gayle"?
A No.
Q Did Gayle ever say "This is my husband, Bill"?
A No.
Q Your answer?
A No.

* * * *

[73] MR. OLSON: I call Armin Ohnesorge.

ARMIN OHNESORGE,

called as a witness by the plaintiff herein, having been first duly sworn, was interrogated and testified as follows:

* * * *

[75]

CROSS-EXAMINATION

BY MR. EISENBERG:

* * * *

Q Just answer my question. Did you determine whose [76] clothes they were in the dresser drawer at that time?
A No.
Q Did you determine whose dresses were hanging up in the closet?
A No.
Q Did you see anybody lying in bed?
A Lying, no.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 72-1355

UNITED STATES, PETITIONER

v.

WILLIAM EARL MATTLOCK

ORDER ALLOWING CERTIORARI—Filed May 29, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 506834 714

No. 72-1355

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM EARL MATTLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
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HENRY E. PETERSEN,
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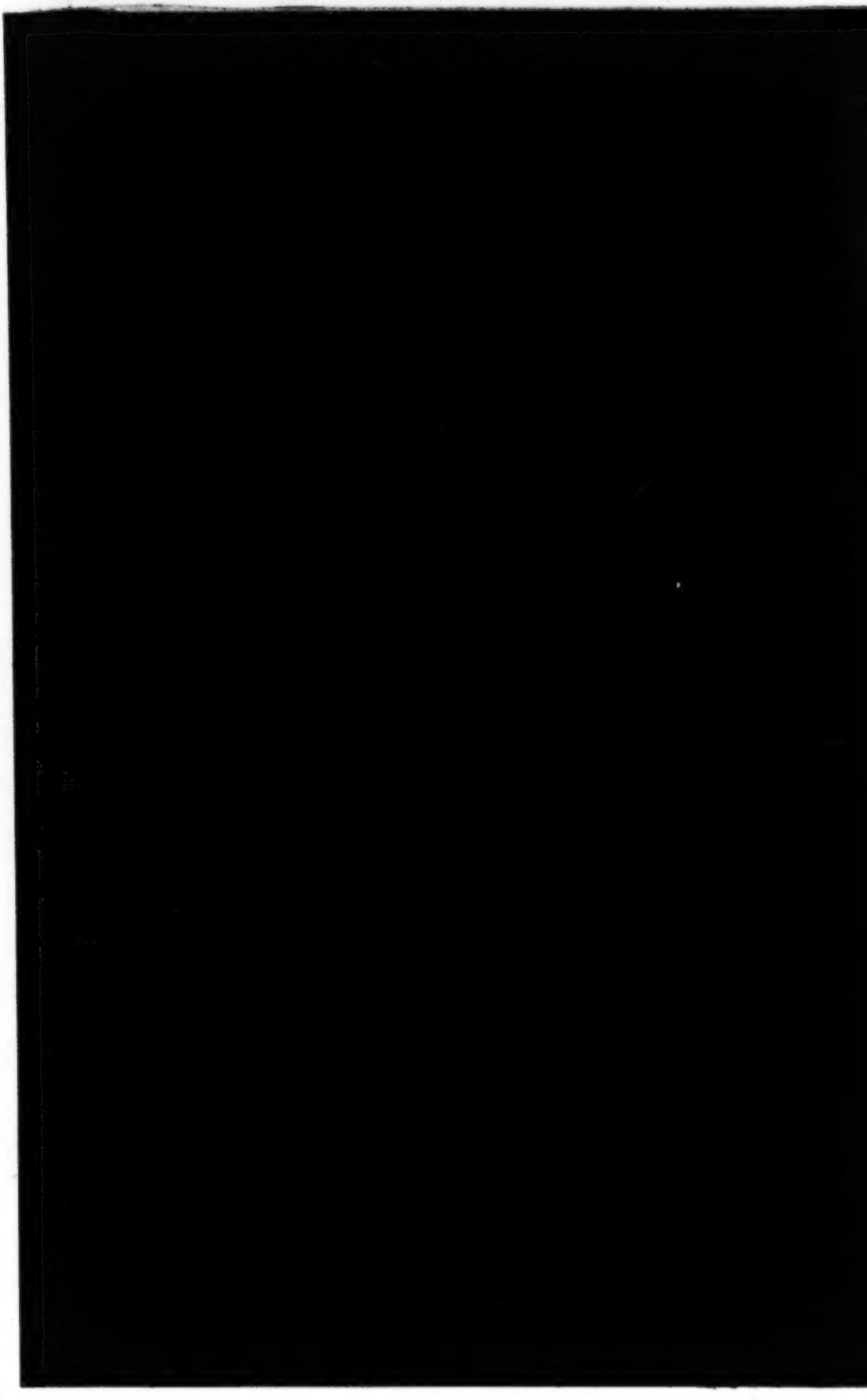

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1355

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM EARL MATTLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–8a) is reported at 476 F. 2d 1083. The final opinion and order of the district court (Pet. App. C, pp. 10a–20a) are not reported. Two earlier opinions of the district court which were superseded by its final opinion (Pet. Apps. D and E, pp. 21a–32a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 9a) was entered on February 5, 1973. On February 26, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to April 6,

1973, and the petition was filed on that date. The petition was granted on May 29, 1973 (A. 40).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, to establish the validity of a warrantless search consented to by a third party reasonably appearing to have authority to consent to the search, the government must prove that the consenting party also had the actual authority to consent to the search.

2. Whether, in opposing a motion to suppress evidence on the ground that the consent to the search was not valid, the government must prove the sufficiency of the consent "to a reasonable certainty."

3. Whether the hearsay rule applies to the introduction of evidence at suppression hearings and, if so, whether the out-of-court statements by respondent and a woman that they were married were inadmissible to show their joint occupancy of the bedroom which the woman authorized police officers to search.

STATEMENT

Respondent was indicted for bank robbery (18 U.S.C. 2113) in the United States District Court for the Western District of Wisconsin. He moved to suppress certain items, including $4,995 in cash, that had been seized in the course of three searches of a house in which he had rented a bedroom. The motion was granted as to some of the items, including the $4,995, and denied as to others (Pet. App. C, pp. 10a–20a). On appeal by the United States, the court of appeals affirmed (Pet. App. A, pp. 1a–8a).

[1] "A." refers to the printed Appendix filed with the Clerk.

1. On the morning of November 12, 1970, respondent was arrested by local police officers in the yard of a house rented by Mr. and Mrs. Walter Marshall in Pardeeville, Wisconsin (Pet. App. C, pp. 10a–11a). The residents of the house, at the time, were Mrs. Marshall, her three children (including her daughter, Mrs. Gayle Graff), Mrs. Graff's three-year-old son, and respondent (Pet. App. C, p. 11a).

Immediately after respondent's arrest, three local police officers went to the door of the Marshall house and were admitted by Mrs. Graff (Pet. App. C, p. 12a). The officers told her that they were looking for money and a gun they believed to be hidden in the house and they asked if they could make a search (*ibid.*). Mrs. Graff consented (*ibid.*).[2] Mrs. Graff told

[2] The officers testified that Mrs. Graff was very cooperative and that she said she had nothing to hide (A. 9, 12, 16). The officers did not specifically inform Mrs. Graff that she had the right to withhold consent. The question whether investigating officers are required, as a condition of a valid consent search, to inform the consenting person of the right to withhold consent was not considered by the courts below because they held the search to be invalid on other grounds (Pet. App. C, p. 17a; cf. Pet. App. A, p. 2a, n. 1). We note that this Court has since held that failure by the officers so to inform the consenting person does not *per se* invalidate the search, but is merely one factor to be considered in determining whether, under all the circumstances, the consent was voluntarily given. *Schneckloth* v. *Bustamonte*, No. 71–732, decided May 29, 1973.

Mrs. Graff herself testified at the suppression hearing that she never consented to any search of the premises (Transcript of proceedings, April 5, 1971, pp. 91–92, 93–94). The district court discredited this testimony (Pet. App. C, p. 12a). Mrs. Graff was subsequently indicted for, and convicted of, perjury in her testimony at the hearing. Imposition of sentence was suspended and she was placed on probation for two years.

the officers that respondent "was sleeping in an upstairs bedroom which is also occupied by her" (A. 15) and that "she slept in the same bed" (A. 13, see also A. 10 and A. 16). She specifically consented to their searching that room (the "east bedroom") (Pet. App. C, p. 12a).[3]

At the time of the search there was a double bed in the east bedroom with two pillows on it and the bed presented the appearance of having been slept in (Pet. App. C, p. 16a). There was men's and women's clothing in the closet (*ibid.*). There was a four-drawer dresser in the room, two drawers of which contained men's clothing and the other two of which contained women's clothing (*ibid.*). Mrs. Graff told the officers, "Bill [respondent] has the two bottom drawers and the two top drawers are mine" (Pet. App. C, pp. 15a, 16a; A. 22–23).

In searching the bedroom, the officers discovered and seized $4,995 in cash concealed in the closet (Pet. App. A, p. 2a; Pet. App. C, p. 12a; A. 13–14). The legality of that seizure is the only issue presented.[4]

---

[3] None of the officers asked Mrs. Graff whether respondent occupied the room as a guest or as a paying tenant, whether she and respondent were married, or whether they had been living together as husband and wife, and Mrs. Graff said nothing to the officers on these subjects (Pet. App. C, p. 12a).

[4] In addition to the cash, certain other items were discovered and seized in the course of later searches of the east bedroom and other parts of the house. The district court ordered some of those items suppressed in addition to the money. For the reasons explained in the petition (pp. 4–5, n. 2), we have not contested in this Court the suppression of any item other than the money.

2. Additional evidence was introduced at the suppression hearing tending to show that respondent and Mrs. Graff were, in fact, joint occupants of the east bedroom. Respondent, Mrs. Graff and her child had been living at the house since the preceding summer, when they arrived together from Florida; previously they had lived together for five months in a one-bedroom apartment in Florida (Pet. App. C, pp. 11a, 15a). Respondent had agreed to pay the Marshalls $25 per week for room and board (Pet. App. C, p. 11a). He was current in these payments, or nearly so, at the time of his arrest (Pet. App. C, pp. 11a–12a).

After, but on the same day as, the search in question Mrs. Graff told F.B.I. agents that she and respondent had been sleeping together in the east bedroom regularly, including the early morning hours of that day (Pet. App. C, p. 15a; A. 23–24, 26–27). She also told the agents that, while she was not lawfully married to respondent, "I consider myself a common-law wife" (A. 24, see also A. 27).

Prior to respondent's arrest, at various times and places, and to various persons, both respondent and Mrs. Graff had represented that they were married or had made statements indicating that they were husband and wife (Pet. App. C, p. 15a). In September, 1970, Mrs. Graff had introduced respondent to her employer as her husband (A. 33–34) and respondent, in a conversation with the wife of the employer (for whom respondent was then also working), had referred to Mrs. Graff as his wife (A. 30–31). In the same month Mrs. Marshall introduced respondent

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to an acquaintance as "Gayle's husband." Respondent did not deny it[5] (A. 37–38). Finally, Mrs. Graff's former husband testified that when he took some papers to Mrs. Graff at the Marshall house, respondent told him, "Leave her alone. She's not your responsibility, she is mine" (Transcript of proceedings, June 22, 1971, pp. 59–60).

There was also additional testimony from neighbors that on various occasions they had seen respondent and Mrs. Graff openly going to, or coming from, the east bedroom (Pet. App C, pp. 15a–16a).

3. The district court found that the circumstances as they appeared to the officers just prior to their search of the east bedroom, including Mrs. Graff's statement to the officers that she and respondent occupied the bedroom, reasonably indicated to the officers that she was a joint occupant of the room; the court therefore concluded that "just prior to the search, it reasonably appeared to the searching officers that facts existed which would render [Mrs.] Graff's consent [to the search of the bedroom] binding on [respondent]" (Pet. App. C, p. 14a).

The court held, however, that where consent given by a third person is relied upon as the justification for a search, the government must show, not only that

[5] A police officer testified that, the afternoon after the search, Mrs. Marshall told F.B.I. agents that respondent and Mrs. Graff were married "to the best of my knowledge. * * * But I don't feel it was any of my business to really ask or pry * * *" (Transcript of proceedings, April 5, 1971, pp. 120–121). However, at the hearing, Mrs. Marshall testified that she did not think respondent and Mrs. Graff were married, and had never told anyone that they were (Supplemental transcript of proceedings, April 5, 1971, p. 14).

it reasonably appeared to the officers that the person had authority to consent, but also that the person had actual authority to permit the search.

In assessing whether the government had shown that Mrs. Graff and respondent had in fact been joint occupants of the bedroom, the court expressly disregarded, on the ground that they constituted inadmissible hearsay, (1) Mrs. Graff's statements to the local officers at the time of the search acknowledging that she and respondent jointly occupied the bedroom and shared its dresser, and that the women's clothing in the dresser was hers (*supra*, pp. 3–4) (Pet. App. C, pp. 15a, 16a), (2) Mrs. Graff's statement to the federal agents after the search that she and respondent had been regularly sleeping in the bedroom (*supra*, p. 5) (Pet. App. C, p. 15a), and (3) the statements which Mrs. Graff and respondent had both made, to persons in the community prior to the search, indicating that they were husband and wife (*supra*, pp. 5–6) (*ibid.*). The only evidence on the subject of joint occupancy considered by the court was, therefore, the evidence that Mrs. Graff and respondent had lived together for five months in a one-bedroom Florida apartment just prior to their taking up residence in the Marshall home; their occasional coming from and going to the east bedroom; the slept-in appearance of the two-pillow double bed at the time of the search; and the presence of both men's and women's clothing in the closet and dresser (Pet. App. C, pp. 15a, 16a).

Excluding what it considered inadmissible hearsay, the court ruled that the government had failed to establish—to the requisite degree of certainty (see note

6, *infra*)—that respondent and Mrs. Graff had in fact jointly occupied the east bedroom and concluded that Mrs. Graff had not had actual authority to consent to the search (Pet. App. C, pp. 14a–16a). The court therefore suppressed the evidence seized from the bedroom (Pet. App. C, p. 19a).

The court of appeals affirmed, holding that the validity of the search depended on proof of actual authority to consent, not merely apparent authority (Pet. App. A, pp. 4a–6a); that the government had had the burden of proving actual authority "to a reasonable certainty, by the great weight of the credible evidence" (Pet. App. A, pp. 6a–7a);[6] and that the extrajudicial statements of Mrs. Graff and respondent had been properly excluded from the suppression hearing as hearsay (Pet. App. A, p. 7a).

[6] The district court had stated in its opinion that the burden of proof borne by the government was proof "to a reasonable certainty, by the *greater* weight of the credible evidence" (Pet. App. C, pp. 10a, 16a; emphasis added). In its brief in the court of appeals, a copy of which is being lodged herewith, the government inadvertently misquoted the standard used by the district court as requiring proof "to a reasonable certainty, by the *great* weight of the credible evidence" (pp. 2, 18; emphasis added) and the court of appeals, in affirming the suppression order, approved the formulation that had been misquoted in the government's brief. See note 12, *infra*.

SUMMARY OF ARGUMENT

I

The courts below properly recognized that either of two persons jointly occupying a room may validly consent to a search of the area subject to their joint control. It is undisputed that Mrs. Graff, with whose consent the search here was conducted, told the investigating officers just prior to the search that she and respondent jointly occupied the east bedroom, and that it reasonably appeared to the officers from the totality of the circumstances confronting them (including Mrs. Graff's statement) that such was the fact. It reasonably appeared to the officers, in other words, as the courts below properly conceded, that Mrs. Graff had the authority to permit them to search the room.

The courts erred in holding that to justify the search the government was required to prove, in addition, that Mrs. Graff in fact had this authority—to prove, in other words, that she was in fact a joint occupant of the bedroom. The Fourth Amendment prohibits only "unreasonable" searches and seizures. The test is whether the police action is reasonable when undertaken. Hence it was sufficient for Fourth Amendment purposes that the investigating officers here responded reasonably to the facts as they appeared—in accepting as true the evidently credible statement by Mrs. Graff that she and respondent shared the bedroom and in proceeding with confidence that they were validly authorized to search it. And, as we show later, Mrs. Graff did in fact have the right to permit the search.

To suppress evidence found in a search because the police may have made a reasonable mistake as to the authority of the consenting party to consent to the search would frustrate legitimate law enforcement without advancing the interests served by the exclusionary rule. The purpose of the exclusionary rule is to eliminate an incentive for lawless invasions of privacy by the police. Application of the rule when it is conceded that the officers acted reasonably does not further that objective.

II

If (notwithstanding our primary argument) the government is required to prove actual cohabitation, the court of appeals applied an erroneous standard of proof. The standard the court applied was proof "to a reasonable certainty, by the great weight of the credible evidence." The correct criterion is whether there has been proof by a preponderance of the evidence—a manifestly less stringent norm.

III

Even if the courts below were correct in requiring the government to prove that Mrs. Graff was in fact as well as appearance a joint occupant of the bedroom, they erred in holding inadmissible the out-of-court statements made by her and respondent indicating that they were living together as husband and wife.

Reliable evidence, though technically within the hearsay rule, may properly be considered by a court sitting without a jury at a suppression hearing. Because they are "the child of the jury system"

(Thayer), the technical common law rules of evidence have no proper place at a hearing in which no jury participates. As a consequence of his professional training and detached judicial temperament, a judge is expected to be able to make proper inferences from reliable evidence that under strict hearsay rules might be kept from a jury.

The validity of this submission is supported by the fact that the proposed new Federal Rules of Evidence specifically provide that in ruling on admissibility questions the judge is not bound by the rules of evidence (except those relating to privileges).

Mrs. Graff's out-of-court statements were reliable. They were candid, matter-of-fact, and, if not "against interest" in any legally recognized sense, at all events in no sense self-serving. In addition to being consistent with one another, furthermore, they were corroborated by the related evidence which the courts below conceded was admissible. There is, in short, no conceivable reason for not crediting them.

ARGUMENT

I

TO ESTABLISH THE LEGALITY OF THE SEARCH IT SUFFICED FOR THE GOVERNMENT TO SHOW THAT IT REASONABLY APPEARED TO THE INVESTIGATING OFFICERS THAT MRS. GRAFF HAD AUTHORITY AS A JOINT OCCUPANT TO CONSENT TO THE SEARCH AND THAT SHE DID IN FACT CONSENT TO IT.

The court below did not question the strong evidence that Mrs. Graff, who said she shared a room with the respondent, voluntarily consented to the

search made by the police, see pp.3–4, *supra*. The court, moreover, positively found "that facts existed * * * from which the officers could reasonably believe that * * * Graff * * * had authority to consent to a search and that [her consent] * * * would be binding upon the defendant"[7] (Pet. App. A, pp. 2a–3a). But the court ruled that the government must prove that Mrs. Graff did *in fact* have "authority to bind defendant" for the evidence seized to be admissible (Pet. App. A, pp. 6a–7a) and that the government had failed in that proof (*ibid.*). This holding is erroneous. The requirement that the government prove the actual authority of a person who reasonably appears to have authority to consent to a search, and does consent, places a restriction on consent searches not required by the Fourth Amendment or the reasons for the exclusionary rule—and excludes probative and often definitive evidence that should be available to the courts.

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[7] It is settled that any of several persons sharing the use of a room, automobile, or even a duffel bag, may validly consent to a search of it. See, *e.g.*, *Frazier* v. *Cupp*, 394 U.S. 731, 740; *Schneckloth* v. *Bustamonte*, *supra*, slip op. at p. 27. See also *United States* v. *Stone*, 471 F. 2d 170, 173 (C.A. 7), certiorari denied, April 16, 1973 (No. 72–1042); *United States* v. *Thompson*, 421 F. 2d 373, 375–377 (C.A. 5), vacated on other grounds, 400 U.S. 17; *United States* v. *Johnson*, 413 F. 2d 1396, 1400 (C.A. 5); *United States* v. *Mackiewicz*, 401 F. 2d 219, 223–224 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Alloway*, 397 F. 2d 105, 108–110 (C.A. 6).

Both courts below appear mistakenly to have assumed that the reason the seized evidence is admissible against the absent

1. In *Schneckloth* v. *Bustamonte*, No. 71–732, decided May 29, 1973, this Court made clear that nothing in the policy of the Fourth Amendment is designed to discourage citizens from consenting to searches to aid in the apprehension of criminals. "Rather," the Court said, "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." Slip op. at p. 25. "And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to

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occupant is that the consenting occupant waives the absent occupant's Fourth Amendment rights (Pet. App. A, pp. 5a, 6a; Pet. App. C, pp. 14a, 16a, 18a; Pet. App. E, pp. 29a–30a). This notion, though occasionally encountered in the decisions relating to co-occupant consent searches (*e.g.*, *Anderson* v. *United States*, 399 F. 2d 753, 756–757 (C.A. 10)), is unsound. A more accurate analysis is that the consenter has the right to allow the police to search the premises he occupies and that whatever evidence is found in that search is evidence found in a lawful search, admissible against all persons, including the co-occupant. No question of delegated authority to waive the absent occupant's constitutional rights is involved. As noted in *Roberts* v. *United States*, 332 F. 2d 892, 896–897 (C.A. 8), certiorari denied, 380 U.S. 980:

"It is not a question of agency, for a wife should not be held to have authority to waive her husband's constitutional rights. This is a question of the wife's own rights to authorize entry into premises where she lives and of which she had control."

See also, *United States* v. *Stone*, *supra*, 471 F. 2d at 173; *United States* v. *Thompson*, *supra*, 421 F. 2d at 376; *United States* v. *Airdo*, 380 F. 2d 103, 106–107 (C.A. 7), certiorari denied, 389 U.S. 913; *Stein* v. *United States*, 166 F. 2d 851, 855 (C.A. 9), certiorari denied, 334 U.S. 844.

be indulged against voluntary relinquishment" (*ibid.*). As the Fourth Amendment prohibits only unreasonable searches, and as the exclusionary rule is designed to help enforce that mandate, the question should be whether it was unreasonable for the police to make the search they made in this case and whether any Fourth Amendment interest would be served in excluding the evidence.

In conducting an investigation, police officers must act on the basis of the facts as they appear at the time. What the Fourth Amendment requires is that their action be reasonable at the time it is undertaken. One aspect of the rule is that an entry made without probable cause cannot be validated by what the search later turns up. But the reverse of the proposition is equally sound: a subsequent discovery that the officers were misled by deceiving appearances does not change the fact that their action was reasonable.[8] This Court expressly so recognized in *Hill* v. *California*, 401 U.S. 797. In that case the Court sustained the legality of a search of the defendant's apartment, without a warrant or the defendant's consent, incident to the arrest of a man who answered the door and whom the police reasonably but wrongly believed to be the defendant. In upholding the admissibility of evidence found in the apartment the Court noted, "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and

[8] Here, however, the officers were not misled. Mrs. Graff correctly told the police that she lived in the room she authorized them to search.

the arrest a reasonable response to the situation facing them at the time" (401 U.S. at 804). Similarly, in the only case we have been able to find involving, like this one, a factual dispute over the consenting person's authority with respect to the searched premises, the California Supreme Court concluded (*People* v. *Gorg*, 45 Cal. 2d 776, 783):

> [W]hen as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority.

See, also, *Gurleski* v. *United States*, 405 F. 2d 253, 261 (C.A. 5), certiorari denied, 395 U.S. 981; *People* v. *Hopper*, 268 Cal App. 2d 774, 779.

The reasoning of these cases applies here. It was sufficient for Fourth Amendment purposes that the investigating officers responded reasonably to the facts as they appeared—in accepting as true the evidently credible statement by Mrs. Graff that she and respondent shared the east bedroom, and in accepting her consent to search as valid.[9]

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[9] We are not arguing that the searching officer's mere "good faith" is sufficient; his belief must be reasonable. Nor do we suggest that in every circumstance the inquiry ends after probing the searching officer's state of mind: his good faith belief that he has a valid warrant will not cure a defect in the underlying affidavit. But where, as here, there is no suggestion of prior official misconduct or unreasonable action, it is, we submit, wholly appropriate to test the propriety of the searching officer's conduct by viewing the situation as it appeared to him at the time.

Both opinions below pose the hypothetical case of an imposter

Stoner v. *California*, 376 U.S. 483, relied on by the court of appeals (Pet. App. A, p. 5a) and by respondent (Resp. to Pet., p. 10), is not to the contrary. There, the Court held that as a matter of law a hotel desk clerk, unless authorized by the occupant of the room, cannot consent to a search of a guest's room. Since the officers knew that the consenting person was the clerk and that he was not authorized by the occupant, no question of consent to a search by one reasonably believed to be an occupant was involved. The Court's statement that Fourth Amendment rights "are not to be eroded * * * by unrealistic doctrines of 'apparent authority'" (376 U.S. at 488) must be read in light of the entirely distinguishable fact-situation there presented. The comment has no relevance to this case, where the officers justifiably believed that the person authorizing the search was an occupant of the premises, because an occupant clearly has the authority to permit a search, see note 7, *supra*.

2. Even if it were held that it is not enough for the police reasonably to believe that they had consent to search, when the person giving consent is without actual authority, it does not mechanically follow that the exclusionary rule should apply. The application of

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who consents to the search of premises and argue that this possibility requires the exclusion of evidence obtained in a search if the consenter does not in fact have the authority the police reasonably believed him to have. (Pet. App. A, p. 4a; Pet. App. C, p. 16a.) Nothing like the posed hypothetical situation is involved in this case and the resolution of that question should properly await a case involving those facts. However, *Hill v. California*, 401 U.S. 797, 804, strongly supports the proposition that the reasonable appearance at the time of the search, and not the later discovery as to identity, would govern.

that rule is based on the practical consideration of preventing unlawful police searches. *Mapp* v. *Ohio*, 367 U.S. 643, 656; *Elkins* v. *United States*, 364 U.S. 206, 217. In considering the question of the retroactivity of the exclusionary rule, where the deterrent effect of the rule could have little play, the Court held the rule inapplicable. *Linkletter* v. *Walker*, 381 U.S. 618, 629. The Court has also refused to apply the rule where illegally obtained evidence was used only for impeachment of a witness. *Walder* v. *United States*, 347 U.S. 62. See discussion in the concurring opinion of Justice Powell in *Schneckloth*, *supra*, slip op. at pp. 18–22. In the present case, the courts below have specifically found that the police reasonably believed that they had received a valid consent to search from a person who had the authority to give that consent (see pp. 6, 11–12, *supra*). It is difficult to see how, as a practical matter, an exclusion of the evidence obtained in a case such as this would prevent police unlawfulness, for the police reasonably believed that they were acting lawfully, and presumably would so believe in a future case.

II

THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD OF PROOF IN DETERMINING THAT THE UNITED STATES HAD NOT SHOWN THAT MRS. GRAFF HAD ACTUAL AUTHORITY TO PERMIT THE SEARCH.

1. It is undisputed that the government proved that Mrs. Graff had reasonably appeared to the officers to be a co-occupant. Hence the question of the appropriate standard of proof need not be reached if the Court

accepts our principal contention—that it was the situation as it reasonably appeared to the officers that controlled the validity of the search. The district court, however, required proof at the suppression hearing that Mrs. Graff was in fact a co-habitant of the room. The test by which the district court appraised the sufficiency of the government's evidence on that point was by inquiring whether it had been proved "to a reasonable certainty, by the *greater* weight of the credible evidence" (Pet. App. C, pp. 10a, 16a; emphasis added). The court of appeals, on the mistaken assumption that the standard applied by the district court had been whether Mrs. Graff's joint occupancy had been proved "to a reasonable certainty, by the *great* weight of the credible evidence" (emphasis added), approved the latter standard (Pet. App. A, pp. 6a–7a).[10] We submit that standard was erroneous.[11]

The proper criterion of the sufficiency of the proof as to an issue of fact in a preliminary hearing on the admissibility of evidence is whether there has been proof by a preponderance of the evidence. *Lego* v. *Twomey*, 404 U.S. 477. In *Lego*, this Court rejected a contention that the voluntariness of a confession offered by the government must be proved beyond a reasonable doubt. The Court said (404 U.S. at 488; footnote omitted):

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[10] See note 6, *supra*, p. 8, for the circumstances that had caused the court of appeals to assume that the standard applied by the district court had been the one mentioned.

[11] We concede that the burden was on the government to prove the warrantless search valid. See *Vale* v. *Louisiana*, 399 U.S. 30, 34; *Chimel* v. *California*, 395 U.S. 752, 761; *Bumper* v. *North Carolina*, 391 U.S. 543, 548.

> [W]e are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond reasonable doubt. Evidence obtained in violation of the Fourth Amendment has been excluded from federal criminal trials for many years. *Weeks* v. *United States, supra.* The same is true of coerced confessions offered in either federal or state trials. *Bram* v. *United States,* 168 U. S. 532 (1897); *Brown* v. *Mississippi, supra.* But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. * * * Without good cause, we are unwilling to expand currently applicable exclusionary rules * * *.

Thus the court of appeals clearly erred in applying the strict standard it did to the government's effort to show that the challenged evidence had been lawfully seized.[12]

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[12] The government, in reliance on *Lego*, had urged in its brief in the court of appeals that the preponderance standard was the correct one and had asked the court to remand the case to the district court with directions to reconsider, in the light of that standard, its finding that the government had not adequately proved Mrs. Graff's actual authority to authorize search (pp. 18–22). In making this argument the government had mistakenly assumed, as previously pointed out (note 6, *supra*, p. 8), that the standard applied by the district court had been proof "to a reasonable certainty, by the *great* weight of the credible evidence" (emphasis added). That standard was, of course, as we have suggested in the text, a substantially severer one than the preponderance criterion; indeed it approached, if it was not practically equivalent to, the strictest standard known to the law—proof beyond a reasonable doubt. Whether the

2. Notwithstanding that the court of appeals' error was based on a mistaken assumption as to the standard applied by the district court, and assuming (as we do for present purposes) that the trial court's statement of the standard was essentially correct (see note 12, *supra*), the error was nevertheless prejudicial. If either court had truly employed the correct standard (preponderance) in viewing the government's evidence that Mrs. Graff was in fact a joint occupant of the bedroom, it would have, we submit, concluded that the government's evidence met, or more than met, the test. Certainly, the court of appeals may have concurred in the district court's conclusion that the evidence fell short only because it assumed that more than a preponderance of the evidence was required to prove that Mrs. Graff actually occupied the room.

It follows, we suggest, that if the Court reaches the present issue, remand of the case to the court of appeals would be appropriate to enable that court to reconsider, in light of the proper standard of proof, the question whether the government sufficiently proved that Mrs. Graff was a joint occupant of the bedroom. This submission is independent of the related question,

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standard actually employed by the district court—which it phrased proof "to a reasonable certainty, by the *greater* weight of the credible evidence" (emphasis added)—differs meaningfully from the correct standard (preponderance) is less clear. Cf. the Jury Instructions Committee's "Comment" accompanying 1 Wisconsin Board of Circuit Judges, *Wisconsin Jury Instructions*—Civil 200 (1972) (the source of the standard applied by the district court, see note 6, *supra*, p. 8): "The committee feels that *greater weight* is an exact synonym for fair preponderance and much more understandable to the average juror" (emphasis in original).

discussed next of whether evidence presented by the government on that issue was improperly disregarded as hearsay.

III

EVEN IF THE COURTS BELOW PROPERLY REQUIRED THE GOVERNMENT TO PROVE THAT MRS. GRAFF WAS IN FACT AS WELL AS APPEARANCE A JOINT OCCUPANT OF THE EAST BEDROOM, THEY ERRED IN HOLDING INADMISSIBLE THE OUT-OF-COURT STATEMENTS MADE BY HER AND RESPONDENT INDICATING JOINT OCCUPANCY.

We assume in this Point, *arguendo,* as we did in Point II, that the government was required to show that Mrs. Graff was in fact as well as appearance a joint occupant of the east bedroom in order to prove the search valid. If the Court accepts our principal contention—that it was enough that it had reasonably appeared to the officers that Mrs. Graff was a co-occupant—it will have no occasion to consider the present issue.

The excluded statements consisted of (1) Mrs. Graff's statements to the investigating officers at the time of the search that she and respondent jointly occupied the bedroom and shared its dresser and that the women's clothing in the dresser was hers; (2) her statement to the federal agents following (but on the same day as) the search that she and respondent had been sleeping together in the bedroom regularly, including the early morning hours of that day;[13] and

[13] For the purpose of determining Mrs. Graff's *actual* authority to consent to the search, there is of course no objection to looking to evidence unavailable to the officers when they first

(3) the statements by both Mrs. Graff and respondent, made to persons in the community prior to the search, that they were husband and wife. *Supra*, p. 7. These statements were concededly hearsay, and none is readily classifiable under any of the standard exceptions to the hearsay rule. Nonetheless, we will argue that, as reliable hearsay, they are admissible at a suppression hearing before a district judge sitting without a jury.

A. Reliable hearsay may properly be considered in a suppression hearing before the court sitting without a jury.

The pretrial suppression hearing was held before a district judge sitting without a jury. The purpose of the hearing was to determine whether the money found in the closet of the east bedroom was admissible at respondent's upcoming trial for bank robbery. The admissibility of that evidence at the bank robbery trial depended on whether Mrs. Graff, who authorized the search of the room, had authority to do so; and that, in turn, depended on whether Mrs. Graff was a joint occupant of the room with respondent. Mrs. Graff made several acknowledgments to the searching officers, and later to F.B.I. agents, that she was a joint occupant of the room: both Mrs. Graff and respondent also made statements in the community that

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entered. Indeed, both courts below properly considered, on this issue, the physical appearance of the searched room. It would be otherwise if (as we primarily contend) the correct test is whether the officers *reasonably believed* Mrs. Graff had authority to consent to the search; in that event, only what was known to the officers before they undertook the search would be relevant.

they were husband and wife. The district judge excluded these statements from consideration at the suppression hearing, on the ground that they constituted inadmissible hearsay. We contend that the judge erred in so doing—for the reason that the technical common law rules of evidence do not apply at such a juryless proceeding.

1. Wigmore declares, "In *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply." 5 Wigmore, *Evidence*, § 1385 (3d ed. 1940); emphasis in original. Wigmore states this principle without citation of supporting case law. The only supporting allusion is a reference to an earlier portion of his treatise in which he argues that the ordinary rules of evidence are not generally regarded as applicable at *ex parte*, interlocutory, extradition, or disbarment proceedings before the court because "there is no jury [in such proceedings], and the rules of Evidence are, as rules, traditionally associated with a trial by jury." 1 Wigmore, *Evidence*, § 4 (3d ed. 1940).

The pertinent historical case law on the applicability of the rules of evidence to preliminary hearings on admissibility of evidence is, as McCormick notes, "scattered and inconclusive." McCormick, *Evidence* § 53, pp. 123–124, n. 8 (1954).[14] McCormick observes

[14] Substantially the same conclusion was reached in an earlier and more exhaustive study, in which the early English and more recent American authorities were examined in some detail. Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 Yale L.J. 1101 (1927). As regards the English case authorities, the study concluded that Phipson, the English commentator on the law of evidence, had

that the American authorities "suggest that the judges trial and appellate give primacy here to habit rather than to practical adaptation to the situation, and tend to require the observance of jury-trial rules of evidence [at such hearings]." McCormick, *supra*, p. 124, n. 8.

But if Wigmore's statement is too categorical from a historical viewpoint, it is unexceptionable as a statement of principle. As "the child of the jury system" (Thayer, *A Preliminary Treatise on Evidence at the Common Law* 266 (1898)), the technical common law rules of evidence have no proper place at a hearing in which no jury has a role. "[O]ur law of evidence," Thayer noted, "is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, as the outcome of a quantity of rulings by sagacious lawyers, while settling practical questions, in presiding over courts where ordinary, untrained citizens are acting as judges of fact." *Id.* at p. 509.

Since the purpose of rules of evidence is to seek to prevent "ordinary, untrained citizens" from mak-

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summed up the situation more accurately than Wigmore when he noted, more cautiously, that "the better opinion is" that such admissibility hearings are not subject to the strict rules of evidence. Maguire and Epstein, *supra*, 36 Yale L.J. at 1101, 1111-1112. Cf. Phipson, *Evidence*, para. 24, p. 16 (10th ed. 1963). Phipson cites in this connection *Knight* v. *Campbell* (an 1848 *nisi prius* decision by Chief Baron Pollock, the only reference to which in print occurs in 1 Taylor, *Evidence*, § 517, note 7 (9th ed. 1897)) and *Duke of Beaufort* v. *Crawshay*, L.R. 1 C.P. 699 (1866). The decisions referred to are discussed in Maguire and Epstein, *supra*, 36 Yale L.J. at 1110-1111.

ing unwarranted inferences from otherwise probative material,"[15] it is evident that the reason for the rules ceases when a judge alone is deciding the issue. As a consequence of professional training and detached judicial temperament, a judge is expected to be on the alert against the kind of unwarranted inference-making which the evidence rules are designed to prevent. McCormick is right, therefore, when he states:

> Should the exclusionary law of evidence, "the child of the jury system" in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.

Op. cit. supra, pp. 123–124, n. 8.

This Court has noted that, absent an express statutory requirement to the contrary, "it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies * * *." *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 155 and cases cited.[16] Cf. *Morrissey* v. *Brewer,* 408 U.S.

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[15] The rules of evidence "operate to exclude relevant evidence." McCormick, *supra*, § 53. "And chiefly, it [the law of evidence] determines, *as among probative matters*, * * * what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence" (emphasis added) (Thayer, *supra*, at p. 264).

[16] *Bridges* v. *Wixon*, 326 U.S. 135, 153–154, cited by the court of appeals (Pet. App. A, p. 7a), is not to the contrary. There, as this Court noted, the hearsay statements the introduction of which was held to have rendered the deportation proceeding unfair were admitted in violation of regulations of the Immi-

471, 489 (evidence rules not applicable to parole revocation hearings). No more, it is submitted, should they apply to juryless court proceedings.

2. We do not suggest, of course, that *none* of the rules of evidence should apply at such proceedings. Certain of the rules—those involving privileges of various kinds are examples—are based on reasons of policy that have no relation to the objective of guarding untrained laymen against the dangers of erroneous factfinding. Cf. 8 Wigmore, *Evidence*, § 2175 *ff.* (McNaughton rev. 1961). Manifestly there is no reason to relax the rules of that type merely because no jury is present.[17] But we do suggest that *reliable* hear-

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gration and Naturalization Service (326 U.S. at 150–153). Moreover, the Court in *Bridges*, treating the deportation proceeding as in substance a criminal *trial*, and noting that defendants cannot be *convicted* on the basis of hearsay, reasoned that it would be equally inappropriate to permit deportation on such evidence (326 U.S. at 153–154). That aspect of the *Bridges* rationale is, of course, inapposite here, since there is no question here of the admissibility of hearsay at petitioner's trial—but only of its admissibility at a pretrial hearing concerning the admissibility at trial of other evidence.

[17] See Maguire and Epstein, *supra*, 36 Yale L. J. at 1101–1102:

"None of the quotations above [quotations from Wigmore and other commentators favoring the non-applicability of the ordinary rules of evidence to juryless admissibility hearings] should be taken to mean that *every* rule of evidence goes by the board in these preliminary judicial inquiries. The mere shift from ultimate to introductory questions and from jury to judge furnishes no cause for discarding such doctrines as the marital privileges and incompetencies, the privilege against self-incrimination, the privilege protecting state secrets, or the lawyer-client privilege. All these doctrines are supposed to guard interests which would suffer as greatly from forced public revelations to

say, even if it falls within no standard exception to the hearsay rule, should be admissible in non-jury suppression hearings, to be accorded such weight as, in the circumstances, it merits. Cf. *Chambers* v. *Mississippi*, 410 U.S. 284.[18] In other words, we contend it was error for the courts below to hold the out-of-court statements involved here to be inadmissible simply because they involved hearsay.[19] That the excluded statement were reliable is shown *infra* (pp. 28–29).

3. That the rule we urge is sound is attested, finally, by the fact that its substance is incorporated in one of

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a judge as from like revelations to a jury. But this shift does furnish good cause for taking unconventional short cuts through the hearsay rule and other doctrines intended wholly or principally to guard against erroneous findings of fact in the very trial." (Emphasis in original; footnotes omitted.)

[18] In *Chambers* this Court held that it was a denial of due process in the circumstances of that case to exclude reliable hearsay offered by the defendant at a criminal trial (confessions by one not on trial, made under circumstances suggesting they were trustworthy, to the offense charged). If to exclude trustworthy hearsay from consideration by *the jury* can in some instances be not only erroneous but fatally so, it would appear to follow a *fortiori* that trustworthy hearsay should be admissible in the court's discretion at a hearing in which no jury participates.

[19] Whether any relaxation of the evidence rules in general (or of the hearsay rule in particular) may, or should, be permitted where the court sits as the trier of the ultimate facts (as at a jury-waived trial) need not be considered in this case. Cf. Note, *Applicability of Rules of Evidence Where the Judge is the Trier of Facts in an Action at Law*, 42 Harv. L. Rev. 258 (1928). Our contention as to the permissibility of such relaxation is limited to pretrial and intra-trial hearings as to the admissibility of evidence at the trial proper.

the proposed new Federal Rules of Evidence.[20] Rule 104(a) specifically provides in relevant part:

> Preliminary questions concerning * * * the admissibility of evidence shall be determined by the judge * * *. In making his determination he is not bound by the rules of evidence except those with respect to privileges.

Thus this Court, in proposing these Rules to Congress, has endorsed the substance of the precise contention the government here makes.[21]

B. The hearsay involved here was reliable.

That Mrs. Graff's out-of-court acknowledgements were reliable is apparent from the circumstances in which they were made.[22] The statements were candid,

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[20] The Rules were originally scheduled to have become effective on July 1, 1973. Under Pub. L. 93–12, 87 Stat. 9, signed by the President on March 30, 1973, the effectiveness of the rules is indefinitely suspended until further affirmative action by Congress.

[21] That the Court's endorsement is in the form of a proposed statute-type Rule, to take effect in the future, is no obstacle to the Court's adoption of the substance of the Rule as the appropriate rule for decision of this case. The legal precedents in the field are scattered and inconclusive, as noted earlier, and the proposed new Rule is merely the sanctioning, with proposed statutory force, of a procedure whose justification is rooted in principle and practice.

[22] Neither court below suggested that they were unreliable. Nor has respondent done so at any stage of the proceedings. All have taken the position that the statements were inadmissible simply because they were technically hearsay.

matter-of-fact, and, if not "against interest" in any usual or legally recognized sense, at all events in no sense self-serving. When in response to the investigating officers' inquiries Mrs. Graff stated that she occupied the east bedroom with respondent (a man to whom she was not married and whom she had just observed being arrested, see A. 19), there is, it is submitted, no rational basis for viewing the statement as other than the truth. The same is true of her acknowledgements a moment later—after she had led the officers to the bedroom and consented to its search—that she and respondent shared the room's dresser and that the women's clothing in it was hers. Her statements to the F.B.I. agents later the same day, acknowledging that she and respondent had been sleeping together regularly in the bedroom, were similarly and equally trustworthy. The acknowledgements, moreover, being consistent as well as candid, were corroborative of one another. Cf. *Chambers* v. *Mississippi, supra,* 410 U.S. at 300. In addition, all were corroborated by the statements which Mrs. Graff and respondent had both made to persons in the community, prior to the search, indicating that they were husband and wife (*supra,* pp. 5–6)—as well as by the evidence (non-declaratory in character) which the district court did consider in finding that the couple had cohabited at least "at times" in the bedroom (Pet. App. C, pp. 15a–16a; see *supra,* pp. 4–6). The excluded statements, in short, were made in such circumstances as to provide unusually strong assurances of reliability.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.[23]

Respectfully submitted.

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AUGUST 1973.

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[23] If the Court should sustain the government's principal contention (Point I, supra, pp. 11–17), the suppression order should be ordered vacated insofar as it pertains to the seized $4,995 (the only item whose suppression is here challenged) and the case remanded to the district court for consideration of the question—not previously reached by it—whether the search was valid in the absence of advice to Mrs. Graff by the investigating officers that she was not obliged to consent to it (see Pet. App. C, p. 17a; note 2, *supra*). In making that determination, the court would of course be bound by this Court's holding in *Schneckloth* v. *Bustamonte*, No. 71–732, decided May 29, 1973. If the Court should reverse on the ground that the court below applied an erroneous standard of proof, remand to that court—for reconsideration, in light of the proper standard of proof, of whether the government had sufficiently proved that Mrs. Graff was a joint occupant of the bedroom—would be appropriate. If the reversal were based on the ground of erroneous exclusion of the out-of-court statements of Mrs. Graff and respondent, remand to the district court, for reappraisal of the sufficiency of the proof of joint occupancy in light of that evidence, would be indicated.

U.S. GOVERNMENT PRINTING OFFICE: 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1355

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM EARL MATLOCK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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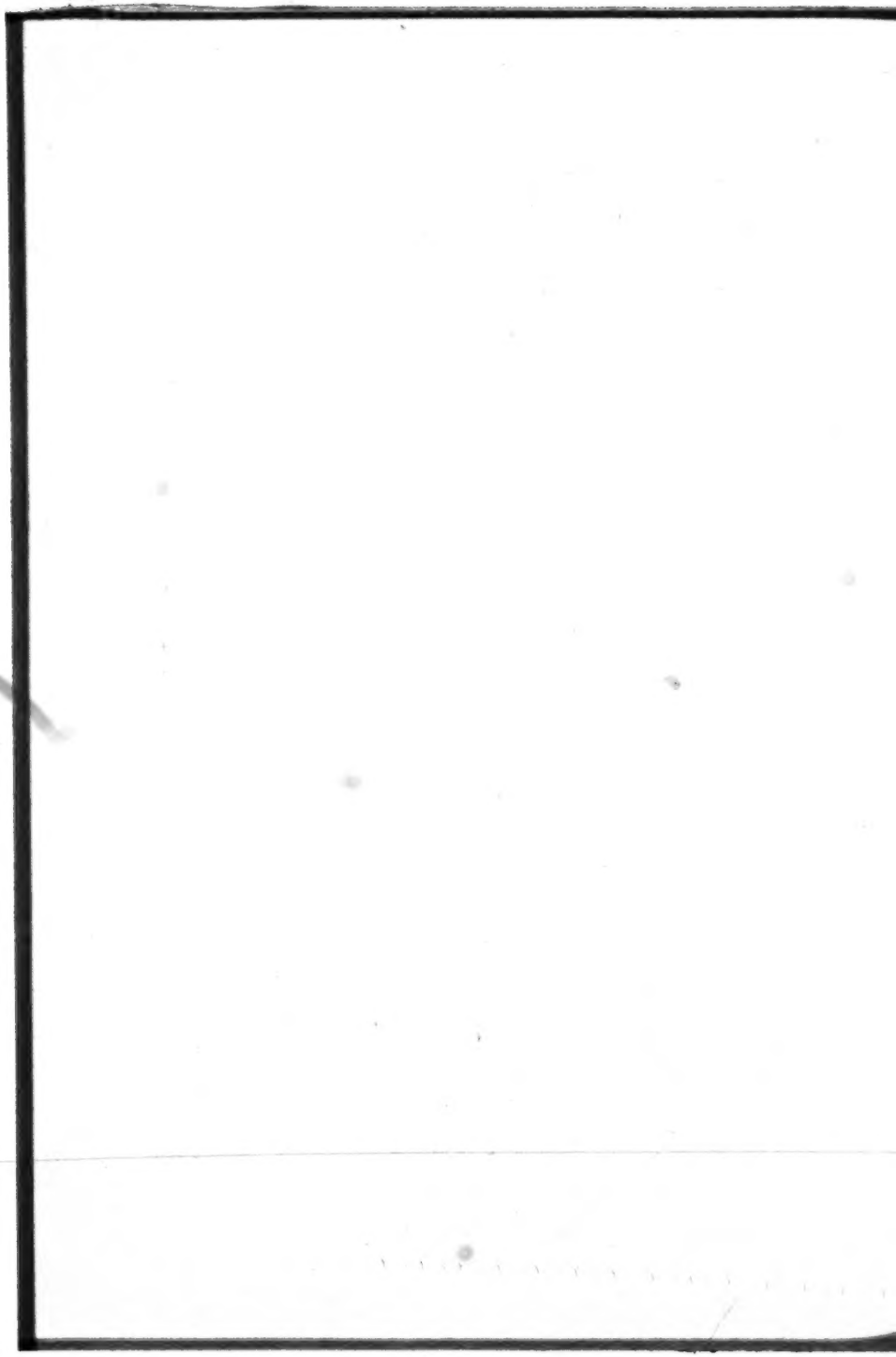

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STATEMENT OF FACTS

At approximately 9:30 a.m. on November 12, 1970, several local law enforcement officers went to the William E. Marshall home, in Pardeeville, Wisconsin, for the purpose of arresting William E. Matlock, the Respondent herein. They arrested him in the yard of the home, some substantial distance from the house. Matlock offered no resistance. He was placed in a squad car parked some distance from the house. The house was under complete seige.

The home was leased by Walter and Elaine Marshall, and on said date was occupied by Mr. and Mrs. Marshall, their thirteen year old daughter, Kathleen, their sixteen year old son, Steven, an adult daughter, Gayle Graff, and her three year old son, and by the Respondent herein. At no time were Gayle Graff and the Respondent married to one another.

Respondent occupied a room on the east side of the second floor. There was an agreement between Mr. and Mrs. Marshall and Respondent that he would pay $25.00 per week for his room and board. He was current in his payments, or nearly so, as of November 12, 1970. At no time did the Respondent consent to a search of any part of the Marshall home.

Immediately after the arrest of Respondent, three local law enforcement officers went to the door of the Marshall home. They were admitted by Gayle Graff. The officers told Gayle that they were looking for money and a gun and wished to search the house. At this time the officers did not know where in the house, if at all, the money or gun was located, nor did they know which part of the house, if any, had been occupied by Respondent. They asked Gayle Graff whether they could search the house. She consented.

At no time was a search warrant obtained by any law enforcement officer, either local police or FBI, although there was adequate time to obtain one or more warrants. There was no emergency nor any danger to any police officer or any other persons which required that a search proceed without a warrant. The search was not incidental to the arrest of Respondent.

None of the officers made any inquiry as to whether Respondent occupied the east bedroom as a guest or as a paying tenant, nor whether Respondent and Gayle Graff were married to one another, or whether they had been

living together regularly in the Marshall home, or elsewhere. Nothing was said to the officers on these subjects. The searching officers seized $4,995.00 and certain other items from a closet and dresser-drawer in Matlock's room.

The Respondent was indicted for bank robbery in the United States District Court for the Western District of Wisconsin. In the District Court, a motion was brought to suppress certain of the items seized during the warrantless police searches. The District Court, after extensive evidentiary hearings, suppressed the evidence seized during the first search, including the $4,995.00.

On appeal by the Government, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's Order relating to the suppression of those certain items of evidence.

SUMMARY OF ARGUMENT

I

The Courts below properly held that in order for a warrantless search to be valid and fall within the meaning and spirit of the Fourth Amendment, in a situation in which consent is given by a third party to police officers to search another's room, said consentor must not only have had apparent authority, but also must have had actual authority to give said consent.

This Court and other courts have properly, on previous occasions, used the two-prong test of "apparent" and "actual" authority in reaching decisions regarding warrantless searches consented to by third parties. This Court on a previous occasion specifically rejected the position which the Government now urges, namely, one-prong of the two-prong approach, i.e., "apparent authority," as the sole criteria for determining constitutionality.

II

The Courts below properly recognized that the Government had to establish facts pertaining to the actual authority of the consenter "to a reasonable certainty, by the greater weight of the credible evidence." The Government urges this Court to adopt a standard that is in fact very, if not totally similar to that used by the lower courts in reaching their decisions. The Government does not, and cannot show how its position was prejudiced by the standard of proof used in the lower courts.

III

The lower courts correctly ruled that certain out-of-court statements made by Respondent and Mrs. Graff were hearsay and did not fall within any exception to "the hearsay rule." The Government agrees that the statements are hearsay. However, it attempts to create a new category of hearsay called "reliable hearsay," without any authority to support its position. The lower courts' position was correct in holding that hearsay is not admissible as substantive evidence to prove the existence of a fact in issue.

ARGUMENT

I.

TO ESTABLISH THE LEGALITY OF THE SEARCH THE COURTS BELOW CORRECTLY HELD THE GOVERNMENT MUST SHOW NOT ONLY THAT IT REASONABLY APPEARED TO THE INVESTIGATING OFFICERS THAT MRS. GRAFF HAD AUTHORITY AS A JOINT OCCUPANT TO CONSENT TO THE SEARCH, AND THAT SHE DID IN FACT CONSENT TO IT, BUT ALSO, THAT MRS. GRAFF DID IN FACT HAVE THE ACTUAL AUTHORITY TO CONSENT TO A SEARCH OF THE RESPONDENT'S ROOM.

The Government argues that to require it to prove the actual authority of a person who reasonably appears to have authority to consent to a search, and does consent, "places a restriction on consent searches not required by the Fourth Amendment."

The Fourth Amendment to the Constitution of the United States reads:

"No warrant shall issue, but upon probable cause."

The presence of a search warrant serves a high function, and, absent a grave emergency, the Fourth Amendment is interposed as a Magistrate between a citizen and the police. This was done not to shield criminals or to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to intrust to the discretion of those whose job is the detection of crime and the arrest of criminals.

Here we have a case where the searching officers admitted they were in no danger. They further admitted they had no knowledge whatsoever whether there was

any evidence or proof of the alleged crime in the Marshall home. Matlock was in their custody. They did not ask him for *his* permission to search the Marshall residence or, in particular, his room. No inquiry was made as to whether Respondent, in fact, resided in the Marshall residence, and if he did, what his living arrangements were. One can only assume that inquiry was not made because the officers felt that Respondent would deny them permission to search his room.

The Government would have this Court accept a rule which would permit a person who appears to have apparent authority to consent to a search and to waive the constitutional rights of another, even if the consenting person is utterly without actual authority to act on the other person's behalf, or, even if he is a total impostor.

The "apparent authority" rule advocated by the Government in this case was expressly rejected in *Stoner v. California*, 376 U.S. 483, 487 (1964).

> "Accordingly, the respondent has made no argument that the search can be justified as an incident to the petitioner's arrest. Instead, the argument is made that the search of the hotel room, although conducted without the petitioner's consent, was lawful because it was conducted with the consent of the hotel clerk. We find this argument unpersuasive.
>
> "Even if it be assumed that a state law which gave a hotel proprietor blanket authority to authorize the police to search the rooms of the hotel's guests could survive constitutional challenge, there is no intimation in the California cases cited by the respondent that California has any such law. Nor is there any substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority

to consent to the search. Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' As this Court has said, 'It is unnecessary and ill-advised to import into the laws surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . (W)e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones v. United States,* 362 U.S. 257, 266-267, 4 L.Ed.2d 697, 705, 706, 80 S.Ct. 725, 78 ALR 2d 233.

"It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's."

In *Chapman v. United States,* 365 U.S. 610 (1961), a search by police officers of a house occupied by a tenant invaded the tenant's constitutional rights even though the search was authorized by the owner of the house. The owner presumably had not only apparent authority, but also actual authority to enter the house for certain purposes. The officers' purpose in entering, however, was not for those purposes reserved to the owner. We call *Chapman* to the Court's attention because it is a case in which this Court considered not only "reasonable appearance" but also "actual authority," and the scope of that authority, to determine whether a voluntary consentor's consent to search was binding upon the defendant in that case. While it is true that in *Chapman,* this Court did not

directly consider the question which the Government raised in the instant case, the Court did, in effect, use the *apparent authority* and *actual authority* test upholding the lower court in reaching its decision in *Chapman*.

While it is clear that one of the joint occupants of a residence may consent to a search of premises jointly occupied, and by his consent bind the non-consenting occupant to the evidence seized therefrom, courts in cases involving this type of situation have considered the "actual authority" of the consentor in reaching their decision. *Roberts v. United States*, 332 F.2d 892, 896, 897 (CA 8th Cir. 1965), cert. denied, 380 U.S. 980 (1965), held that where a young woman, not the defendant's wife, was living with the defendant, a married man, and voluntarily consented to a police search of the premises without a warrant, said search was constitutionally proper:

> "The defendant's argument that Miss Hilan's consent could not affect his right to be free from unreasonable searches must also be rejected. In *United States v. Sferas*, supra, 210 F.2d at 74, we acknowledge the rule that 'where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either.' The rule has been applied by other courts to searches following consent given by the wife of the defendant, e.g. *Roberts v. United States*, 332 F.2d 892 (8th Cir. 1964), cert. denied, 380 U.S. 980, 85 S.Ct. 1344, 14 L.Ed.2d 274 (1965), and by a woman standing in the position of the defendant's wife, *Nelson v. People of State of California*, 346 F.2d 73, 77 (9th Cir.), cert. denied 382 U.S. 964, 86 S.Ct. 452, 15 L.Ed.2d 367 (1965). The considerations most applicable to the third person's consent in such cases are not related to principles of agency connecting the defendant

with the person acquiescing in the search, but rather concern the reasonableness, under all the circumstances, of a search consented to by a person having immediate control and authority over the premises or property searched. (Cite omitted.) Miss Hilan lived in the apartment, and therefore had authority to consent to a search of it. . ."

In the dissent in *United States v. Robinson* (CA 7th Cir. 1973), 13 Cr L 2306, Chief Judge Swygert stated:

". . . I accept the rule of this circuit that 'where two persons have equal rights to the use or occupation of premises, either may give consent to a search,' *U.S. v. Sferas,* 210 F.2d 69, 74 (7th Cir.), cert. denied, 347 U.S. 935 (1954). As the very statement of the rule suggests, however, a question in every case such as this must be whether the third party who consents is in fact or in appearance a joint possessor.

* * * * *

"(W)hen the consenting party says nothing, as in *White,* a search is often upheld. No longer, however, may the Government rely on silence; Matlock effectively places upon the police the burden of determining whether a person encountered at the door has the authority to consent.

"Another contention of the Government, set forth in its brief, is that the conclusions of the trial court are contrary to the purpose of the exclusionary rule and opposed to the interests of law enforcement:

* * * * *

"This argument assumes too much. The police may search for and seize property of a suspect so long as they limit their entry to areas in which the consenting party has rights of joint tenancy and so long as the items seized have at a minimum some ostensible relevance to their investigation."

The New Mexico Court of Appeals in *State v. Johnson*, 13 Cr L 2490 (1973), held:

> "Padilla could consent to a search of his premises and this consent extends to portions of the premises that Padilla controlled jointly with other residents. However, * * * the issue is whether Padilla's consent, under the facts of this case, can validate the search of defendant's duffel bag. * * * There is no claim that the consenting party had any ownership or possessory interest in the effect seized. * * * There is no evidence that the bag was searched under the impression it was the property of someone other than the defendant. Nor is there evidence of any mistaken impression that the bag was jointly used, possessed or controlled by the consenting party and the defendant. Finally, there is no evidence of any authority (actual or mistaken) on the part of Mr. Padilla to consent to a search of defendant's personal effects."

The Government cites *People v. Gorg*, 45 Cal.2d 776, as being the only case they could find similar to the one at hand. In *Gorg*, the defendant was a student who rented a room from the consenting homeowner, and who, after the defendant's arrest called the defendant's father, cleaned the defendant's room for the defendant's father to stay in, found a bucket containing marijuana plants in the defendant's room, called police officers and gave them the bucket, and at a later date, along with the defendant's father, allowed the police to enter and search the defendant's room. The homeowner asked the police officers to search the whole house. The defendant brought a Motion to Suppress the evidence seized, but was unable to prove that the homeowner lacked the authority to authorize the search. The court in *Gorg* considered only the question of the actual authority of the homeowner to consent to the search.

In *Gurleski v. United States*, 405 F.2d 253, 261 (C.A. 5), cert. denied, 395 U.S. 981, cited by the Government, the court held:

> "We subscribed to the view that 'where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either.'
>
> * * * * *
>
> "It is clear that [the consentor] had an unrestricted right to operate the vehicle and had possession of the keys at all relevant times."

In *Gurleski*, the Court not only considered the apparent reasonableness of the consentor's permission to officers to search the defendant's car, but went on to make a factual determination of the actual authority of the consentor before deciding that the search was constitutional.

The Government also cites this Court's decision in *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854, 875 (1973), as holding that the Fourth Amendment is not designed to discourage citizens in the aid of apprehension of criminals. *Schneckloth*, however, dealt only with the voluntariness of a consent to search and did not consider the question of the consentor's "authority" to consent to such search. There was no question but that the consentor had the authority to consent:

> "Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."

In the present case there is no question as to the voluntariness of Gayle Graff's consent to the search of Respondent's room and thus *Schneckloth* does not apply.

In the third case cited by the Government, *People v. Hopper*, 268 Cal. App. 2d 774, 779, the Court never reached the question of the "actual authority" of the consentor. It ruled that the consentor did not even have "apparent authority" to consent to a search of the defendant's home.

"The apparent authority" test is an additional or partial test of reasonableness of a search designed to insure observance of Fourth Amendment rights, rather than a sole criteria of reasonableness as the Government argues. This standard has been established simply because it would be ipsofacto unreasonable for police to pursue a search and seizure if it appeared to them that the person consenting to the search was not authorized to give such a consent. It was never intended that it should provide the sole justification for a search and seizure by police officers.

The District Court, while acknowledging that the statement by Mrs. Graff, the third party, to the police officers made it "reasonably apparent" to the officers that she and the Respondent jointly occupied the east bedroom of the Marshall home, further pointed out that the searching officers took no steps to inquire for themselves as to the status of the Respondent in the Marshall home; whether he occupied the east bedroom as a guest or a paying tenant; whether he and Mrs. Graff were married or whether he and Mrs. Graff had been living together regularly in the Marshall home or elsewhere. In fact, nothing was said to the officers on these subjects.

To accept the Government's "apparent authority" position would be to assume that "ignorance is bliss"

when it comes to a warrantless police search. The less the officer knows, and the less he takes the time to find out, and the less he actually finds out, the better off the search becomes, when scrutinized under the provisions of the Fourth Amendment. One can hardly propose such a standard in the name of furthering democracy.

In *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971), this Court stated:

"The State proposes three distinct theories to bring the facts of this case within one or another of the exceptions to the warrant requirement. In considering them, we must not lose sight of the Fourth Amendment's fundamental guarantee. Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago in *Boyd v. United States*, 116 U.S. 616, 635, 20 L.Ed. 746, 752, 6 S.Ct. 524, is worth repeating here:

'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and least to gradual depreciation of the right, as if it consisted more in sound then in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

'Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment–subject only to a few specifically

established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."

'(T)he burden is on those seeking the exemption to show the need for it.' "

It is a recognized exception to the warrant requirement of the Fourth Amendment that a search is reasonable if the searching officers are given consent to search by one actually authorized to give such consent. The Government would have this Court adopt an exception to that exception that is one step further away from the meaning and spirit of the Fourth Amendment, by now saying "a warrantless search is reasonable if consented to by one who may appear to have authority to consent, even if in fact he does not have authority to bind a third party to the results of his consent."

The Constitutional provisions and guarantees of the Bill of Rights were not intended to hamstring the operation of Government agents, as the Government hints, but were instead, "intended for the protection of the people. . ." *Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule did not evolve to punish police, but rather its objective was "the security of one's privacy against arbitrary intrusion by the police." *Elkins v. United States*, 364 U.S. 206, 213 (1960). The Government points to no legitimate compelling reason to extend the aforementioned exception to the Fourth Amendment.

The Government argues that even if the Court finds that a consentor should have actual as well as apparent authority to bind a third person by his consent, there is no reason why the exclusionary rule should apply to any evidence found as a result of said search. The Govern-

ment argues that in the present case, the courts below specifically found that the police reasonably believed they had received a valid consent to search Matlock's room. The courts below also found that the searching officers took no steps to inquire for themselves as to the status of Matlock in the Marshall home and, as pointed out before, the "ignorance is bliss" position advocated by the Government is surely grounds to bring the exclusionary rule and its prohibition to officers and protection to citizens into play. Is it unreasonable to ask that police officers take the time to ask the questions that will enable them to make a determination as to the actual authority of the consentor to consent to a warrantless search? It should be remembered that the officers testified in the present case that they did not feel that they were in any eminent danger of harm. Is it not in line with the intent and spirit of the Fourth Amendment to warn police officers that if they do not take the time to inquire and find out whether or not the consentor has actual authority to consent to a warrantless search, that the fruits of their hasty action will be inadmissible at a trial? A POLICEMAN'S JOB IS ONLY EASY IN A POLICE STATE.

II.

THE COURTS BELOW APPLIED THE CORRECT STANDARD OF PROOF IN DETERMINING THAT THE GOVERNMENT HAD NOT SHOWN THAT MRS. GRAFF HAD ACTUAL AUTHORITY TO PERMIT THE SEARCH.

The Government correctly points out that the District Court appraised the sufficiency of the Government's evidence as to the actual authority of Mrs. Graff to consent to the search of Matlock's room by inquirying

whether it had been proved "to a reasonable certainty, by the *greater* weight of the credible evidence" (Pet. App. pp. 10A, 16A). We assume it was a printing error when the Court of Appeals held that the District Court had been correct in using the standard "to a reasonable certainty, by the *great* weight of the credible evidence." (Pet. App. pp. 6A - 7A).

The Government urges this Court to declare the lower courts in error and use the criteria of "proof by a proponderance of the evidence." It is Respondent's position that even though the Court of Appeals used the word "great" instead of the District Court's "greater," that these criteria are in fact little different from the criteria which the Government now urges this Court to accept.

Black's Law Dictionary, Fourth Edition, p. 1344, defines the word "preponderance" as follows:

> "Greater weight of evidence, or evidence which is more credible and convincing to the mind. *Button v. Metcalf*, 80 Wis. 193, 49 N.W. 809. That which best accords with reason and probability. *U.S. v. McCaskill*, D.C. Fla., 200 F.332. The word 'preponderance' means something more than 'weight'; it denotes a superiority of weight, or outweighing. The words are not synonomous, but substantially different. There is generally a 'weight' of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. *Mathes v. Aggler & Musser Seed Company*, 178 P. 713, 715, 179 Cal. 697; *Barnes v. Phillips*, 184 Ind. 415, III N.E. 419. See, also, *Weight of Evidence*."

Black defines "Weight of Evidence" on page 1765 as:

"The balance of preponderance of evidence; the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other."

The 'weight' or 'preponderance of proof' is a phrase constantly used, the meaning of which is well understood and easily defined. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. *Haskins v. Haskins*, 9 Gray, Mass., 393.

* * * * *

'Weight of Proof' means greater amount of credible evidence and is synonomous with 'preponderance of proof.' *Haskins v. Haskins*, (9 Gray), supra.

McCormick in his 'Handbook of the law of Evidence,' discusses 'burden of proof and presumption' on page 676, 677, and 686, and states the following:

"What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? A widely accepted definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence. This is a simple common-sense explanation which will be understood by jurors and could hardly be misleading in the ordinary case.

* * * * *

". . ., it is submitted that a misdirection as to the burden of persuasion should be assumed by the upper court not to have influenced the verdict unless special reasons appear in the particular case to believe that it did."

Should this Court refuse to accept the position that there is little actual difference between the standard used by the District Court and that proposed by the Government, Respondent submits that the standard set by the District Court was applied, not to the voluntariness of the consent given by Mrs. Graff, but rather to the factual basis underlying Gayle Graff's authority to bind the Respondent with her consent. Where there is a question concerning privileges so fundamental to our system of constitutional law, those privileges cannot be eroded by low standards of proof:

> "This court has always set the high standard of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 82 L Ed 1461 (1939)..." See also *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), and *United States v. Coleman*, 322 F. Supp. 550, 553.

The Government cites *Lego v. Twomey*, 404 U.S. 477, arguing that the standard of proof set forth in that case governing the voluntariness of a confession is the same standard of proof to which the Government should be held in showing that a consentor had actual authority to consent to a search and bind a defendant to the results of that search. In *Lego* this Court held:

> "... the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." 404 U.S. 477, 489.

The question considered by the District Court and the Court of Appeals in this case was different than the question considered in *Lego*, i.e., "The authority of a consentor to bind a defendant to the results of the consentor's action." The decision and standard in *Lego* went specifically to the "voluntariness of the confession." It should be pointed out that the District Court in

Matlock did not hold that the Government had to prove actual authority by "evidence beyond a reasonable doubt," but rather by a standard requiring a lower degree of proof, i.e., "to a reasonable certainty, by the greater weight of the credible evidence."

Respondent submits that where the standards used, such as "fair and positive evidence," or "clear and convincing," or "to a reasonable certainty," or "to a reasonable certainty by the greater weight of the credible evidence," are so inherently subjective, and the Government fails to distinguish the test which it advocates specifically from the test from which it is appealing, and further when the Government fails to show that such semantic subtleties are in any way prejudicial to its position, this Court should not reverse a decision of a lower Appellate Court.

III

THE COURT OF APPEALS DID NOT ERR IN HOLDING INADMISSIBLE THE OUT OF COURT STATEMENTS MADE BY MRS. GRAFF AND RESPONDENT INDICATING THE JOINT OCCUPANCY OF RESPONDENT'S ROOM.

The Government agrees that statements by Respondent and Mrs. Graff, excluded by the District Court as hearsay, were in fact hearsay. The Government, however, argues that there is no reason to exclude hearsay evidence, or as the Government prefers to call it, "reliable hearsay" evidence, from consideration when there is no jury present at a hearing or trial. This Court, in *Bridges v. Wixon*, 326 U.S. 135, 153 (1945), stated:

"The statements which O'Neil allegedly made were hearsay. We may assume that they would be admissible for purposes of impeachment. But they

certainly would not be admissible in any criminal case as substantive evidence. *Hickory v. United States*, 151 U.S. 303, 309, 38 L. Ed 170, 174, 14 S. Ct. 334; *United States v. Block*, (CCA2d) 88 F.2d 618, 620. So to hold would allow men to be convicted on unsworn testimony of witnesses–a practice which runs counter to the notions of fairness on which our legal system is founded."

The sound reasons for excluding hearsay evidence apply without reference to the character of the proceeding or the nature of the court before which the evidence is offered: (1) The declarant who made the hearsay statement commonly speaks without the solemnity of the oath administered to witnesses in a court of law, (2) There is no opportunity, in respect to the out of court declarant, to observe of his demeanor, and (3) The danger in a case of an oral reporting of an out-of-court statement is that the witness reporting the statement may do so inaccurately.

McCormick defines "hearsay" as

"Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." *McCormick, Evidence*, Section 225, Page-460 (1964).

"As a rule, hearsay is inadmissible without reference to the character of the proceeding or the nature of the court before which it is offered. The fact that a court of domestic relations may inform itself by hearsay evidence when acting as a disinterested advisor or conciliator does not permit it to receive

such evidence when exercising a strictly judicial function, such as determining a motion in a divorce suit for the allowance of temporary alimony. The use of hearsay evidence at a trial or hearing on a complaint alleging juvenile delinquency has been held improper in juvenile court proceedings, it being said that hearsay has no more place in a juvenile court than in any other court." 29 Am. Jur.2d, Evidence, Section 495.

It is interesting that the Government states in its brief that as "reliable hearsay" the aforementioned statements of the Respondent and Graff are admissible. The Government cites no authority for the distinction it proposes between pure hearsay and reliable hearsay. If the Government wishes this Court to assume that "reliable hearsay" is a close "cousin" to what we might call "truthful hearsay," this position can be refuted by the fact that some of the statements which the Government wishes to have admitted into evidence were statements made by both Respondent and Graff that they were married. (Pet. App. pp. 7A) The undisputed fact was that Respondent and Graff were never married.

The Government cites *Chambers v. Mississippi*, 410 U.S. 284, (1973), as supporting its position. However, in *Chambers*, this Court reversed a decision which excluded certain defense hearsay evidence because that hearsay evidence fell within a recognized exemption to the hearsay rule.

As its final argument the Government cites Rule 104 (a) of the proposed New Federal Rules of Evidence which holds, in its relevant parts, that preliminary questions concerning the admissibility of evidence shall be determined by the Judge, who is not bound by the rules of evidence except those with respect to privileges. The New Federal Rules of Evidence should not be applied retro-

spectively. The District Court was not bound by Rule 104 (a) at the time it entered its decision.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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UNITED STATES *v.* MATLOCK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-1355. Argued December 10-11, 1973—
Decided February 20, 1974

Respondent was arrested in the front yard of a house in which he lived along with a Mrs. Graff (daughter of the lessees) and others. The arresting officers, who did not ask him which room he occupied or whether he would consent to a search, were then admitted to the house by Mrs. Graff and, with her consent but without a warrant, searched the house, including a bedroom, which Mrs. Graff told them was jointly occupied by respondent and herself, and in a closet of which the officers found and seized money. Respondent was indicted for bank robbery, and moved to suppress the seized money as evidence. The District Court held that where consent by a third person is relied upon as justification for a search, the Government must show, *inter alia*, not only that it reasonably appeared to the officers that the person had authority to consent, but also that the person had actual authority to permit the search, and that the Government had not satisfactorily proved that Mrs. Graff had such authority. Although Mrs. Graff's statements to the officers that she and respondent occupied the same bedroom were deemed admissible to prove the officers' good-faith belief, they were held to be inadmissible extrajudicial statements to prove the truth of the facts therein averred, and the same was held to be true of statements by both Mrs. Graff and respondent that they were married, which was not the case. The Court of Appeals affirmed. *Held:*

1. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. Pp. 169-172.

2. It was error to exclude from evidence at the suppression hearings Mrs. Graff's out-of-court statements respecting the joint occupancy of the bedroom, as well as the evidence that both respondent and Mrs. Graff had represented themselves as husband and wife. Pp. 172-177.

(a) There is no automatic rule against receiving hearsay evidence in suppression hearings (where the trial court itself can accord such evidence such weight as it deems desirable), and under the circumstances here, where the District Court was satisfied that Mrs. Graff's out-of-court statements had in fact been made and nothing in the record raised doubts about their truthfulness, there was no apparent reason to exclude the declarations in the course of resolving the issues raised at the suppression hearings. Pp. 172–176.

(b) Mrs. Graff's statements were against her penal interest, since extramarital cohabitation is a state crime. Thus they carried their own indicia of reliability and should have been admitted as evidence at the suppression hearings, even if they would not have been admissible at respondent's trial. Pp. 176–177.

3. Although, given the admissibility of the excluded statements, the Government apparently sustained its burden of proof as to Mrs. Graff's authority to consent to the search, the District Court should reconsider the sufficiency of the evidence in light of this Court's opinion. Pp. 177–178.

476 F. 2d 1083, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 178. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 188.

Deputy Solicitor General Wallace argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Harry R. Sachse, Allan A. Tuttle,* and *Philip R. Monahan.*

Donald S. Eisenberg, by appointment of the Court, 412 U. S. 948, argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973), the Court reaffirmed the principle that the search of property, without warrant and without probable cause,

but with proper consent voluntarily given, is valid under the Fourth Amendment. The question now before us is whether the evidence presented by the United States with respect to the voluntary consent of a third party to search the living quarters of the respondent was legally sufficient to render the seized materials admissible in evidence at the respondent's criminal trial.

I

Respondent Matlock was indicted in February 1971 for the robbery of a federally insured bank in Wisconsin, in violation of 18 U. S. C. § 2113. A week later, he filed a motion to suppress evidence seized by law enforcement officers from a home in the town of Pardeeville, Wisconsin, in which he had been living. Suppression hearings followed. As found by the District Court, the facts were that respondent was arrested in the yard in front of the Pardeeville home on November 12, 1970. The home was leased from the owner by Mr. and Mrs. Marshall. Living in the home were Mrs. Marshall, several of her children, including her daughter Mrs. Gayle Graff, Gayle's three-year-old son, and respondent. Although the officers were aware at the time of the arrest that respondent lived in the house, they did not ask him which room he occupied or whether he would consent to a search. Three of the arresting officers went to the door of the house and were admitted by Mrs. Graff, who was dressed in a robe and was holding her son in her arms. The officers told her they were looking for money and a gun and asked if they could search the house. Although denied by Mrs. Graff at the suppression hearings, it was found that she consented voluntarily to the search of the house, including the east bedroom on the second floor which she said was jointly occupied by Matlock and herself. The east bedroom was searched and the evidence at issue here, $4,995 in cash, was found in a diaper

bag in the only closet in the room.[1] The issue came to be whether Mrs. Graff's relationship to the east bedroom was sufficient to make her consent to the search valid against respondent Matlock.

The District Court ruled that before the seized evidence could be admitted at trial the Government had to prove first, that it reasonably appeared to the searching officers "just prior to the search, that facts exist which will render the consenter's consent binding on the putative defendant," and second, that "just prior to the search, facts do exist which render the consenter's consent binding on the putative defendant." There was no requirement that express permission from respondent to Mrs. Graff to allow the officers to search be shown; it was sufficient to show her authority to consent in her own right, by reason of her relationship to the premises. The first requirement was held satisfied because of respondent's presence in the yard of the house at the time of his arrest, because of Gayle Graff's residence in the house for some time and her presence in the house just prior to the search, and because of her statement to the officers that she and the respondent occupied the east bedroom.[2]

The District Court concluded, however, that the Government had failed to satisfy the second requirement and

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[1] There were other seizures in the house and the east bedroom on November 12, but none of them is at issue here.

[2] Mrs. Graff was not advised that she had a right to refuse to consent to the search. The District Court expressed no view as to whether the absence of such advice would render her consent invalid, since it found that her consent, however voluntary, would not bind the respondent with regard to the search of his room. *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), has since made clear, of course, that it is not essential for the prosecution to show that the consenter knew of the right to refuse consent in order to establish that the consent was voluntary.

had not satisfactorily proved Mrs. Graff's actual authority to consent to the search. To arrive at this result, the District Court held that although Gayle Graff's statements to the officers that she and the respondent occupied the east bedroom were admissible to prove the good-faith belief of the officers, they were nevertheless extrajudicial statements inadmissible to prove the truth of the facts therein averred. The same was true of Mrs. Graff's additional statements to the officers later on November 12 that she and the respondent had been sleeping together in the east bedroom regularly, including the early morning of November 12, and that she and respondent shared the use of a dresser in the room. There was also testimony that both Gayle Graff and respondent, at various times and places and to various persons, had made statements that they were wife and husband. These statements were deemed inadmissible to prove that respondent and Gayle Graff were married, which they were not, or that they were sleeping together as a husband and wife might be expected to do. Having excluded these declarations, the District Court then concluded that the remaining evidence was insufficient to prove "to a reasonable certainty, by the greater weight of the credible evidence, that at the time of the search, and for some period of reasonable length theretofore, Gayle Graff and the defendant were living together in the east bedroom." The remaining evidence, briefly stated, was that Mrs. Graff and respondent had lived together in a one-bedroom apartment in Florida from April to August 1970; that they lived at the Marshall home in Pardeeville from August to November 12, 1970; that they were several times seen going up or down stairs in the house together; and that the east bedroom, which respondent was shown to have rented from Mr. and Mrs. Marshall, contained evidence that it was also lived in by

a man and a woman.[3] The District Court thought these items of evidence created an "inference" or at least a "mild inference" that respondent and Gayle Graff at times slept together in the east bedroom, but it deemed them insufficient to satisfy the Government's burden of proof. The District Court also rejected the Government's claim that it was required to prove only that at the time of the search the officers could reasonably have concluded that Gayle Graff's relationship to the east bedroom was sufficient to make her consent binding on respondent.

The Court of Appeals affirmed the judgment of the District Court in all respects. 476 F. 2d 1083. We granted certiorari, 412 U. S. 917, and now reverse the Court of Appeals.

II

It has been assumed by the parties and the courts below that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial. This basic proposition was accepted by the Seventh Circuit in this case, 476 F. 2d, at 1086, as it had been in prior cases,[4] and has generally been ap-

[3] When the officers searched the east bedroom, two pillows were on the double bed, which had been slept in, men's and women's clothes were in the closet, and men's and women's clothes were also in separate drawers of the dresser.

[4] *E. g.*, *United States* v. *Stone*, 471 F. 2d 170, 173 (1972), cert. denied, 411 U. S. 931 (1973); *United States* v. *Wixom*, 441 F. 2d 623, 624–625 (1971); *United States* v. *Airdo*, 380 F. 2d 103, 106–107, cert. denied, 389 U. S. 913 (1967). Each of these cases cited with approval *United States* v. *Sferas*, 210 F. 2d 69, 74 (CA7), cert. denied *sub nom. Skally* v. *United States*, 347 U. S. 935 (1954), which expressed the rule "that where two persons have equal rights

plied in similar circumstances by other courts of appeals,[5] and various state courts.[6] This Court left open, in *Amos* v. *United States*, 255 U. S. 313, 317 (1921), the question whether a wife's permission to search the residence in which she lived with her husband could "waive his constitutional rights," but more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared. In *Frazier* v. *Cupp*, 394 U. S. 731, 740 (1969), the Court "dismissed rather quickly" the contention that the consent of the petitioner's cousin to the search of a duffel bag, which was being used jointly by both men and had been left in the cousin's home, would not justify the seizure of petitioner's cloth-

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to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either."

[5] *E. g.*, *United States* v. *Ellis*, 461 F. 2d 962, 967–968 (CA2), cert. denied, 409 U. S. 866 (1972); *United States* v. *Cataldo*, 433 F. 2d 38, 40 (CA2 1970), cert. denied, 401 U. S. 977 (1971); *United States ex rel. Cabey* v. *Mazurkiewicz*, 431 F. 2d 839, 842–843 (CA3 1970); *United States* v. *Thompson*, 421 F. 2d 373, 375–376 (CA5), vacated on other grounds, 400 U. S. 17 (1970); *Gurleski* v. *United States*, 405 F. 2d 253, 260–262 (CA5 1968), cert. denied, 395 U. S. 961 (1969); *Wright* v. *United States*, 389 F. 2d 996, 998–999 (CA8 1968); *Roberts* v. *United States*, 332 F. 2d 892, 894–898 (CA8 1964), cert. denied, 380 U. S. 980 (1965); *United States* v. *Wilson*, 447 F. 2d 1, 5–6 (CA9 1971); *Nelson* v. *California*, 346 F. 2d 73, 77 (CA9), cert. denied, 382 U. S. 964 (1965); *Burge* v. *United States*, 342 F. 2d 408, 413 (CA9), cert. denied, 382 U. S. 829 (1965).

[6] *E. g.*, *People* v. *Howard*, 166 Cal. App. 2d 638, 651, 334 P. 2d 105, 114 (1958); *People* v. *Gorg*, 45 Cal. 2d 776, 783, 291 P. 2d 469, 473 (1955); *People* v. *Haskell*, 41 Ill. 2d 25, 28–29, 241 N. E. 2d 430, 432 (1968); *People* v. *Walker*, 34 Ill. 2d 23, 27–28, 213 N. E. 2d 552, 555 (1966); *Commonwealth ex rel. Cabey* v. *Rundle*, 432 Pa. 466, 248 A. 2d 197 (1968); *State* v. *Cairo*, 74 R. I. 377, 385–386, 60 A. 2d 841, 845 (1948); *Burge* v. *State*, 443 S. W. 2d 720, 722–723 (Ct. Crim. App. Tex.), cert. denied, 396 U. S. 934 (1969).

ing found inside; joint use of the bag rendered the cousin's authority to consent to its search clear. Indeed, the Court was unwilling to engage in the "metaphysical subtleties" raised by Frazier's claim that his cousin only had permission to use one compartment within the bag. By allowing the cousin the use of the bag, and by leaving it in his house, Frazier was held to have assumed the risk that his cousin would allow someone else to look inside. *Ibid.* More generally, in *Schneckloth* v. *Bustamonte*, 412 U. S., at 245–246, we noted that our prior recognition of the constitutional validity of "third party consent" searches in cases like *Frazier* and *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–490 (1971), supported the view that a consent search is fundamentally different in nature from the waiver of a trial right. These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.[7] The

[7] Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, see *Chapman* v. *United States*, 365 U. S. 610 (1961) (landlord could not validly consent to the search of a house he had rented to another), *Stoner* v. *California*, 376 U. S. 483 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

issue now before us is whether the Government made the requisite showing in this case.

III

The District Court excluded from evidence at the suppression hearings, as inadmissible hearsay, the out-of-court statements of Mrs. Graff with respect to her and respondent's joint occupancy and use of the east bedroom, as well as the evidence that both respondent and Mrs. Graff at various times and to various persons had represented themselves as husband and wife. The Court of Appeals affirmed the ruling. Both courts were in error.

As an initial matter we fail to understand why, on any approach to the case, the out-of-court representations of respondent himself that he and Gayle Graff were husband and wife were considered to be inadmissible against him. Whether or not Mrs. Graff's statements were hearsay, the respondent's own out-of-court admissions would surmount all objections based on the hearsay rule both at the suppression hearings and at the trial itself, and would be admissible for whatever inferences the trial judge could reasonably draw concerning joint occupancy of the east bedroom. See 4 J. Wigmore, Evidence § 1048 (J. Chadbourn rev. 1972); C. McCormick, Evidence § 262 (2d ed. 1972).[8]

As for Mrs. Graff's statements to the searching officers, it should be recalled that the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissi-

[8] Rule 801 (d)(2)(A) of the proposed Federal Rules of Evidence, approved by the Court on November 20, 1972, and transmitted to Congress, expressly provides that a party's own statements offered against him at trial are not hearsay.

bility of evidence.[9] In *Brinegar* v. *United States*, 338 U. S. 160 (1949), it was objected that hearsay had been used at the hearing on a challenge to the admissibility of evidence seized when a car was searched and that other evidence used at the hearing was held inadmissible at the trial itself. The Court sustained the trial court's rulings. It distinguished between the rules applicable to proceedings to determine probable cause for arrest and search and those governing the criminal trial itself—"There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." *Id.*, at 173. That certain evidence was admitted in preliminary proceedings but excluded at the trial—and the Court thought both rulings proper—was thought merely to "illustrate the difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt." *Id.*, at 174.

That the same rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions was confirmed on November 20, 1972, when the Court transmitted to Congress the proposed Federal Rules of Evidence. Rule 104 (a) provides that preliminary questions concerning admissibility are matters for

[9] *Bridges* v. *Wixon*, 326 U. S. 135, 153–154 (1945), upon which respondent and the Court of Appeals relied, involved the use of hearsay as substantive evidence bearing on the question of Bridges' membership in the Communist Party, a charge upon which a deportation order had been based. In addition to the fact that the use of unsworn, unsigned statements violated the rules of the Board of Immigration Appeals, the evidence was admitted to prove charges which directly jeopardized "the liberty of an individual," *id.*, at 154, and not for the purpose of determining a preliminary question of admissibility, as in this case.

the judge and that in performing this function he is not bound by the Rules of Evidence except those with respect to privileges.[10] Essentially the same language on the scope of the proposed rules is repeated in Rule 1101 (d)(1).[11] The rules in this respect reflect the general views of various authorities on evidence. 5 J. Wigmore, Evidence § 1385 (3d ed. 1940); C. McCormick, Evidence § 53, p. 122 n. 91 (2d ed. 1972). See also Maguire & Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale L. J. 1101 (1927).

Search warrants are repeatedly issued on *ex parte* affidavits containing out-of-court statements of identified and unidentified persons. *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965). An arrest and search without a warrant were involved in *McCray* v. *Illinois*, 386 U. S. 300 (1967). At the initial suppression hearing, the police proved probable cause for the arrest by testifying to the out-of-court statements of an unidentified informer. The Government would have been obligated to produce the informer and to put him on the stand had it wanted to use his testimony at defendant's trial, but we sustained the use of his out-of-court state-

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[10] Rule 104 (a) provides:

"Rule 104. Preliminary Questions

"(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subdivision (b). In making his determination he is not bound by the rules of evidence except those with respect to privileges."

[11] Rule 1101 (d)(1) provides:

"Rules inapplicable. The rules (other than those with respect to privileges) do not apply in the following situations:

"(1) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under Rule 104 (a)."

ments at the suppression hearing, as well as the Government's refusal to identify him. In the course of the opinion, we specifically rejected the claim that defendant's right to confrontation under the Sixth Amendment and Due Process Clause had in any way been violated. We also made clear that there was no contrary rule governing proceedings in the federal courts.

There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel.[12] However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings, and it seems equally clear to us that the trial judge should not have excluded Mrs. Graff's statements in the circumstances present here.

In the first place, the court was quite satisfied that the statements had in fact been made. Second, there is nothing in the record to raise serious doubts about the truthfulness of the statements themselves. Mrs. Graff harbored no hostility or bias against respondent that might call her statements into question. Indeed, she testified on his behalf at the suppression hearings. Mrs. Graff responded to inquiry at the time of the search that she and respondent occupied the east bedroom together. A few minutes later, having led the officers to the bedroom, she stated that she and respondent shared the one dresser in the room and that the woman's clothing in the

[12] "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." C. McCormick, Evidence § 53, p. 122 n. 91 (2d ed. 1972).

room was hers. Later the same day, she stated to the officers that she and respondent had slept together regularly in the room, including the early morning of that very day. These statements were consistent with one another. They were also corroborated by other evidence received at the suppression hearings: Mrs. Graff and respondent had lived together in Florida for several months immediately prior to coming to Wisconsin, where they lived in the house in question and where they were seen going upstairs together in the evening; respondent was the tenant of the east bedroom and that room bore every evidence that it was also occupied by a woman; respondent indicated in prior statements to various people that he and Mrs. Graff were husband and wife. Under these circumstances there was no apparent reason for the judge to distrust the evidence and to exclude Mrs. Graff's declarations from his own consideration for whatever they might be worth in resolving, one way or another, the issues raised at the suppression hearings.

If there is remaining doubt about the matter, it should be dispelled by another consideration: cohabitation out of wedlock would not seem to be a relationship that one would falsely confess. Respondent and Gayle Graff were not married, and cohabitation out of wedlock is a crime in the State of Wisconsin.[13] Mrs. Graff's statements were against her penal interest and they carried their own indicia of reliability. This was sufficient in itself, we think, to warrant admitting them to evidence for consideration by the trial judge. This

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[13] Wis. Stat. § 944.20 (1971) provides:

"Whoever does any of the following may be fined not more than $500 or imprisoned not more than one year in county jail or both: . . . (3) Openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse."

is the case even if they would be inadmissible hearsay at respondent's trial either because statements against penal interest are to be excluded under *Donnelly* v. *United States*, 228 U. S. 243, 272–277 (1913), or because, if Rule 804 (b)(4) of the proposed Federal Rules of Evidence becomes the law, such declarations would be admissible only if the declarant is unavailable at the time of the trial.

Finally, we note that Mrs. Graff was a witness for the respondent at the suppression hearings. As such, she was available for cross-examination, and the risk of prejudice, if there was any, from the use of hearsay was reduced. Indeed, she entirely denied that she either gave consent or made the November 12 statements to the officers that the District Court excluded from evidence. When asked whether in fact she and respondent had lived together, she claimed her privilege against self-incrimination and declined to answer.

IV

It appears to us, given the admissibility of Mrs. Graff's and respondent's out-of-court statements, that the Government sustained its burden of proving by the preponderance of the evidence that Mrs. Graff's voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence the $4,995 found in the diaper bag.[14] But we prefer that the District Court

[14] Accordingly, we do not reach another major contention of the United States in bringing this case here: that the Government in any event had only to satisfy the District Court that the searching officers reasonably believed that Mrs. Graff had sufficient authority over the premises to consent to the search.

The Government also contends that the Court of Appeals imposed an unduly strict standard of proof on the Government by ruling that its case must be proved "to a reasonable certainty, by the great weight of the credible evidence." But the District Court required only that the proof be by the *greater* weight of the evidence and the

first reconsider the sufficiency of the evidence in the light of this decision and opinion. The judgment of the Court of Appeals is reversed and the case is remanded to the Court of Appeals with directions to remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

Respondent William Matlock has been indicted for robbing a federally insured bank in violation of 18 U. S. C. § 2113. The issue in this case involves the suppression of money found in a closet in Matlock's bedroom during a warrantless search of the home in which he lived. The search of the home, and of the bedroom, was authorized by one Gayle Graff, and the Court now remands this case for the District Court to determine, in the light of evidence which that court had previously excluded, whether Mrs. Graff was in fact a joint occupant of the bedroom with sufficient authority to consent to the search. Because I believe that the absence of a search warrant in this case, where the authorities had opportunity to obtain one, is fatal, I dissent from that disposition of this case.

The home which was searched was rented by one William Marshall, and was occupied by members of his

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Court of Appeals merely affirmed the District Court's judgment. There was an inadvertence in articulating the applicable burden of proof, but it seems to have been occasioned by a similar inadvertence by the Government in presenting its case. In any event, the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence. See *Lego v. Twomey*, 404 U. S. 477, 488–489 (1972). We do not understand the Government to contend that the standard employed by the District Court was in error, and we have no occasion to consider whether it was.

family, including his wife and his 21-year-old daughter Gayle Graff. Respondent Matlock paid the Marshalls for the use of a bedroom in the home, which he apparently occupied with Gayle Graff. Respondent was arrested in the yard of the home on the morning of November 12, 1970. He offered no resistance, and was restrained in a squad car a distance from the home. Immediately thereafter, officers walked to the home, where Mrs. Graff was present. The officers told her they were searching for guns and money, and asked her whether Matlock lived in the house. After being asked by the officers whether they could search the house, and without being told that she could withhold her consent, Mrs. Graff permitted a police search.

During this first search, three officers entered the house. One of the officers testified that they walked through the kitchen, pantry area, front porch, and living room. The officers asked which bedroom was Matlock's. After Mrs. Graff had indicated the second-floor bedroom which she and Matlock occupied and permitted its search, the officers found a diaper bag half full of money in the bedroom closet. The admissibility of this evidence is involved in the instant case.

The officers left the home, but returned a few minutes later for a second search. This time, they found certain other incriminating items in the pantry area. A third search was made in the afternoon. Again, the officers did not secure a warrant to search the home, but waited for an officer to bring Mrs. Marshall home, at which point they secured her consent to a search. Four officers participated in this search, which discovered further evidence downstairs and in a dresser in Matlock's bedroom.

At no time did the officers participating in any of the three searches, including the first search involved in this case, attempt to procure a search warrant from a judicial officer. The District Court, in a finding which the Gov-

ernment does not challenge, found that there was no exigent circumstance or emergency which could provide an excuse for the Government officers' failure to secure a warrant to invade the security of the Marshall home:

> "At no time on November 12, 1970, was a search warrant obtained by any law enforcement officers for the purpose of conducting a search of the Marshall home. There was adequate time to obtain one or more warrants. There was no emergency, nor danger to any police officer or other persons which required that the search proceed without awaiting the time at which a search warrant could be applied for. The search of the house was not incidental to the arrest of the defendant."

This, I believe, is the crucial finding in the case, rather than the ultimate resolution of the question of Gayle Graff's "authority" to consent to the search. This search is impermissible because of the failure of the officers to secure a search warrant when they had the opportunity to do so.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The judicial scrutiny provided by the second clause of the Amendment is essential to effectuating the Amendment, and is a measure whereby a warrant could have been obtained but was not that the ensuing search is "unreasonable" under the Amendment.[1] The intervention of a judicial

[1] The second clause of the Fourth Amendment lays down exacting standards for the issuance of a valid search warrant. The Court,

officer gives the Amendment vitality by restraining unnecessary and unjustified searches and invasions of privacy before they occur. At the same time, a written

however, in effect reads the provision of the first clause of the Amendment proscribing "unreasonable" searches and seizures to allow it to create classes of judicially sanctioned "reasonable" searches, even when they do not comport with the minimum standards which a warranted search must satisfy. But the history of the Amendment indicates that the Framers added the first clause to give additional protections to the people beyond the prescriptions for a valid warrant, and not to give the judiciary carte blanche to later dilute the warrant requirement by sanctioning classes of warrantless searches.

The form of oppressive search and seizure best known to the colonists was the general warrant, or general writ of assistance, which gave the officials of the Crown license to search all places and for everything in a given place, limited only by their own discretion. See *Warden* v. *Hayden*, 387 U. S. 294, 313–317 (DOUGLAS, J., dissenting). It was this abuse which James Otis condemned in Boston in 1761, see 2 J. Adams, Works 523–525, and which Patrick Henry condemned as Virginia debated the new Constitution in 1788. See 3 J. Elliot, Debates 448. Because the Crown had employed the general warrant, rather than the warrantless search, to invade the privacy of the colonists without probable cause and without limitation, it is not surprising that the hatred of the colonists focused on it.

But in concentrating their invective on the general warrant, the colonists and the Framers did not intend to subject themselves to searches without warrants. We begin with James Otis. In his 1761 speech, Otis not only condemned the general warrant, he also envisioned an acceptable alternative. This was not the search without a warrant, but rather searches under warrants confined by explicit restrictions: "I admit that special writs of assistance, to search special places, may be granted to certain persons on oath." 2 J. Adams, Works 524.

In 1778, during debates on the Constitution prior to passage of the Bill of Rights, Virginia recommended for congressional consideration a series of amendments to the Constitution, one of which guaranteed the security of the citizenry against unreasonable Government searches. This proposed amendment quite clearly presupposed that an "unreasonable" search could be avoided only by

warrant helps ensure that a search will be limited in scope to the areas and objects necessary to the search because both the "place to be searched" and the "things to be seized" must be described with particularity. We have

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use of a warrant, and only if that warrant met certain standards. It did not conceive of warrantless searches:

"That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted." 3 J. Elliot, Debates 658.

Accordingly, when the First Congress convened, James Madison of Virginia officially proposed amendments to the Constitution, including one restricting searches and seizures. Like the original Virginia recommendation, it was nurtured by a fear of the general warrants, and emphasized the warrant requirement:

"The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 434–435.

After being referred to the Committee of Eleven, the Amendment was returned to the floor of the House, where it was approved after amendment in a form which closely followed Madison's original proposal, and with its thrust still focusing on the warrant requirement: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." *Id.*, at 754.

Only at this point was the present form of the Amendment, with its two distinct clauses, first suggested. Mr. Benson of New York, chairman of a Committee of Three to arrange the amendments, proposed that "by warrants issuing" be changed to "and no warrant shall issue." His purpose was to *strengthen* the Amend-

therefore held that only the gravest of circumstances could excuse the failure to secure a properly issued search warrant.

Up to now, a police officer had a duty to secure a warrant when he had the opportunity to do so, even if substantial probable cause existed to justify a search. In *Johnson* v. *United States*, 333 U. S. 10, decided in 1948, police officers smelled the unmistakable odor of opium outside a hotel room. They knocked on the door, identified themselves, and told the occupant that they wanted to talk to her. The occupant stepped back acquiescently and admitted the officers. We found that the entry was granted in submission to authority, and

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ment, not to license later judicial efforts to undercut the warrant requirement:

"Mr. Benson objected to the words 'by warrants issuing.' This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read 'and no warrant shall issue.'" *Ibid.*

Benson's amendment was defeated at that point, *ibid.*, but when the Committee of Three returned the amendment to the House, it followed the form suggested by Benson. The prohibition against unreasonable searches was made explicit in a separate clause, and a second clause began with the words earlier proposed by Benson. This form was then accepted, *id.*, at 779, and the Senate concurred. Senate Journal, Aug. 25, 1789. See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 97–103.

The history of the separate clause prohibiting unreasonable searches and seizures demonstrates that it was created in an effort to strengthen the prohibition of searches without proper warrants and to broaden the protections against unneeded invasions of individual privacy. See *id.*, at 103; *Warden* v. *Hayden*, 387 U. S., at 317–318 (DOUGLAS, J., dissenting). It perverts the intent of the Framers to read it as permitting the creation of judicial exceptions to the warrant requirement in all but the most compelling circumstances. See J. Landynski, Search and Seizure and the Supreme Court 42–44.

that the odors alone would not justify the search without a warrant, despite the fact that they would have provided probable cause for a warrant. Since, as in the instant case, no "exceptional circumstances" [2] were cited which might have justified the warrantless search, but only "the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate," *id.*, at 14, 15, we found the warrantless search unconstitutional. Mr. Justice Jackson explained for the Court the need for judicial intervention as a restraint of police conduct before a search was made; and what he said is applicable today:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer,

[2] By way of illustration, we observed that: "No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." 333 U. S., at 15.

not by a policeman or government enforcement agent." *Id.*, at 13–14.

In *Trupiano* v. *United States*, 334 U. S. 699, decided in 1948, there was a search of an illegal distillery made without a warrant, even though the agents who conducted the search had ample information and time with which to secure a search warrant. Since there was no reason but the convenience of the police which could justify the warrantless search, we found it unreasonable. The police, when not constrained by the limitations of a warrant, are free to rummage about in the course of their search. "[T]hey did precisely what the Fourth Amendment was designed to outlaw. . . . Nothing circumscribed their activities on that raid except their own good senses, which the authors of the Amendment deemed insufficient to justify a search or seizure except in exceptional circumstances not here present." *Id.*, at 706–707. Speaking through Mr. Justice Murphy we explained again the reasons for our insistence on adherence to constitutional processes:

> "This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. . . . In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement." *Id.*, at 705.

Likewise, in *McDonald* v. *United States*, 335 U. S. 451, also decided in 1948, officers with probable cause to engage in a search failed to secure a warrant, and we found the search illegal. Officers had heard an adding machine, frequently used in numbers operations, when outside a rooming house. Entering the house through a window, they looked over the transom of McDonald's room and saw gambling paraphernalia. They shouted to McDonald to open his room, and he did so. Again, there was no grave emergency which alone could justify the failure to secure a warrant, *id.*, at 455, and again we patiently reiterated the reasons for our insistence that the police submit proposed searches to prior judicial scrutiny whenever feasible:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." *Id.*, at 455–456.

Jones v. *United States*, 357 U. S. 493, decided in 1958, provides yet another instance of our recognition of the importance of adherence to judicial processes. Federal alcohol agents had secured a warrant to search a home during the daytime, having observed substantial evidence

that illegal liquor was being produced. Rather than executing the warrant, they waited until the evening, when they entered and searched the home. We held, specifically through Mr. Justice Harlan, that probable cause to believe that the house contained contraband was not sufficient to legitimize a warrantless search: "Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Id.*, at 498.

And, indeed, the provisions of the Fourth Amendment carefully and explicitly restricting the circumstances in which warrants can issue and the breadth of searches have become "empty phrases," when the Court sanctions this search conducted without any effort by the police to secure a valid search warrant. This was not a case where a grave emergency, such as the imminent loss of evidence or danger to human life, might excuse the failure to secure a warrant. Mrs. Graff's permission to the police to invade the house, simultaneously violating the privacy of Matlock and the Marshalls, provides a sorry and wholly inadequate substitute for the protections which inhere in a judicially granted warrant. It is inconceivable that a search conducted without a warrant can give more authority than a search conducted with a warrant. See *United States* v. *Lefkowitz*, 285 U. S. 452, 464. But here the police procured without a warrant all the authority which they had under the feared general warrants, hatred of which led to the passage of the Fourth Amendment. Government agents are now free to rummage about the house, unconstrained by anything except their own desires.[3] Even after finding items

[3] For an example of the abuse to which a warrantless search is subject, see *Kremen* v. *United States*, 353 U. S. 346, where the police gutted a home during a warrantless search.

which they may have expected to find and which doubtless would have been specified in a valid warrant, see *Coolidge* v. *New Hampshire*, 403 U. S. 443, 471, they prolonged their exploratory search in pursuit of additional evidence. The judgment of whether the intrusion into the Marshalls' and Matlock's privacy was to be permitted was not made by an objective judicial officer respectful of the exacting demands of the Fourth Amendment; nor were the police limited by the need to make an initial showing of probable cause to invade the Marshall home. Since the Framers of the Amendment did not abolish the hated general warrants only to impose another oppressive regime on the people, I dissent.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I would not limit the remand to the determination whether Mrs. Graff was in fact a joint occupant of the bedroom with sufficient authority to consent to the search. In my view the determination is also required that Mrs. Graff consented knowing that she was not required to consent. "It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 277 (1973) (BRENNAN, J., dissenting). I would hold that an individual cannot effectively waive this right if he is totally ignorant of the fact that, in the absence of his consent, such invasions of privacy would be constitutionally prohibited.